SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1858.

No. [illegible]

THE DEPOSIT BANK OF FRANKFORT, PLAINTIFF IN ERROR,

vs.

THE BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF [illegible]

FILED APRIL 11, 1859.

(13,403.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 296.

THE DEPOSIT BANK OF FRANKFORT, PLAINTIFF IN ERROR,

vs.

THE BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

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a THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Board of Councilmen of the City of Frankfort, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington D. C. within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the court of appeals of the State of Kentucky, wherein The Deposit Bank of Frankfort is plaintiff in error, and you are defendant in error, to show cause if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the chief justice of the court of appeals of the State of Kentucky, this 17th day of March, 1902.

B. L. D. GOFF,
Chief Justice of the Court of Appeals of the State of Kentucky.

Attest:

S. J. SHACKELFORD,
Clerk of the Court of Appeals of the State of Kentucky.

b [Endorsed:] Deposit Bank of Frankfort. Citation. Board of Councilmen of the city of Frankfort. Filed Mar. 18, 1902. S. J. Shackelford, clerk.

Executed March 17", 1902, by delivering to James S. Darnell, mayor of board of councilmen of the city of Frankfort, a copy of the within citation.

A. G. JEFFERS, *S. F. C.*,
By J. W. JEFFERS, *D. S.*

1 *Pleas.*

Court of Appeals of Kentucky.

Pleas before the honorable the court of appeals of Kentucky, at the capitol, in the city of Frankfort, Kentucky, on the 19th day of November, A. D. 1901.

Present: Thos. H. Paynter, chief justice, and associate judges of said court.

Caption.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Appellant,
vs.
DEPOSIT BANK OF FRANKFORT, Appellee.

Be it remembered that heretofore, to wit: on the 14th day of January A. D. 1898, the appellant, The Board of Councilmen of the City

of Frankfort, by its counsel W. H. Julian filed in the office of the clerk of the court of appeals of Kentucky a copy of judgment of the Franklin circuit court in the words and figures following, to wit:

2 *Judgment.*

Franklin Circuit Court.

Filed Feb'y 1st, 1896.

BOARD OF COUNCILMEN OF CITY OF FRANKFORT, Plaintiff,
vs.
DEPOSIT BANK OF FRANKFORT, Defendant. } Judgment.

It appearing to the court that this action has been continued and not heretofore submitted, by agreement between the plaintiff and defendant by their respective attornies, that this action should stand upon the answer filed by the defendant until the decision by the court of appeals in the two cases appealed from this court, in one of which the defendant bank was plaintiff and The County of Franklin &c. were defendants, and in the other The Commonwealth for the use of said county was plaintiff and the defendant bank was defendant, and the liability of the bank for the taxes claimed in this case should be settled and determined by the decision of the court of appeals in said two cases, the defense relied on in this case being the same contract set up and relied upon by the bank in those two cases; and it further appearing to the court by the mandates and opinions of the court of appeals filed in said two cases, that the court of appeals has sustained the defense set up and relied on by the bank in said two cases based upon the contract made by the bank under the Hewitt bill, which is the same contract relied on as a defense in this case: it is now ordered and adjudged, that art. 2 of the act of the General Assembly entitled, "An act to amend
3 the revenue laws of the Commonwealth of Kentucky," approved May 17th 1886. (Gen. Statutes chap. 92 art. 2) and the acceptance of the provisions thereof by defendant constituted a contract between the defendant and the Commonwealth which the latter cannot alter or change without the consent of the former; by the terms of which contract the defendant cannot, during the continuance of its charter, be assessed for taxation, or taxed for State purposes in a different mode or at a greater rate of taxation than as provided for in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon any real estate it may own; that the provisions of the present constitution of this State and of the act of Nov. 11th, 1892 (art. 3 chap. 103 Acts 1891-'2-'3) in so far as they are intended to provide for any assessment or taxation of the defendant's property, right of property or franchise except its said real estate, are in violation of and repugnant to the Federal Constitution and void; that the board of valuation and assessment provided for in said act of Nov. 11th,

1892 had and has no authority in law to assess or value the defendant's franchise for taxation, or the auditor to apportion or certify the same or any part of the same, for county or municipal taxation; that the temporary injunction which was prayed for in this cause at the commencement of the action be and the same is now hereby granted, and the defendants and each of them are perpetually enjoined and restrained from levying upon or selling any property of the defendant for the purpose of collecting any taxes for the
4 city of Frankfort upon the franchise or property of the defendant, except upon its real estate, and it is further adjudged that the defendant recover of the plaintiff its cost in this action expended. To all of which the board of councilmen of the city of Frankfort except and pray an appeal to the court of appeals which is granted.

THOS. B. FORD, *Clerk*,
By J. R. ELLIOTT, *D. C.*

A copy attest:
Filed Feb'y 1st, 1896.

With the foregoing judgment the following application was filed:

Application for Appeal.

Court of Appeals, Ky.

BOARD OF COUNCILMEN OF THE CITY OF Frankfort, Appellant,
vs.
DEPOSIT BANK OF FRANKFORT, Appellee. } Application for Appeal.

The foregoing judgment of the Franklin circuit court was rendered on February the 1st, 1896. The Board of Councilmen of the City of Frankfort now comes and prays the clerk of the court of appeals for an appeal from said judgment to the court of appeals.

W. H. JULIAN,
Att'y for Appellant.
T. H. CROCKETT,
City Attorney.

5 Thereupon on said 14th day of January, 1898, an appeal was granted and a summons was issued, which summons is as follows:

Summons and Return.

The Commonwealth of Kentucky to the sheriff of Franklin county, Greeting:

We command you to summon Deposit Bank of Frankfort to appear before the judges of the court of appeals of Kentucky, at the capitol in Frankfort, on the first day of their next April term, to show

cause, if any it can, why a judgment obtained by it in the Franklin circuit court against Board of Councilmen of City of Frankfort at its Jan'y term, 1896 should not be reversed for errors therein contained, as we from its complaint are informed, and have then and there this writ.

Witness, A. Addams, clerk of our said court, at the capitol aforesaid, this 14th day of January, 1898.

A. ADDAMS, *C. C. A.*,
By ROB'T L. GREENE, *D. C.*

Executed on the Deposit Bank of Frankfort by delivering to B. C. Milam, president of said bank a true copy of the within summons January 15, 1898.

B. F. SUTER, *S. F. C.*,
By P. C. TOWLES, *D. S.*

Afterwards on the 17th day of June A. D. 1898, the appellant by counsel filed in the clerk's office of said court of appeals a transcript of record in words and figures, following, to wit:

6 Franklin Circuit Court.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Appellant,
vs.
DEPOSIT BANK OF FRANKFORT, Appellee.
} Transcript.

Pleas before the Hon. James E. Cantrill, judge of the Franklin circuit court, in above cause.

7 *Petition in Equity.*

Franklin Circuit Court.

Filed August 22nd, 1894.

BOARD OF COUNCILMEN OF THE CITY OF Frankfort, Plaintiff,
vs.
THE DEPOSIT BANK OF FRANKFORT, Defendant.
} Petition in Equity.

Plaintiff states that Frankfort is a city of the third class and that plaintiffs are a body politic and corporate, with power to sue and be sued, contract, &c. Defendant is a bank and corporation organized under the laws of the State of Kentucky; such was the status and characters of the said parties hereto in 1891, and has been ever since said date.

The defendant is indebted to the plaintiff in the sum of $4,243.10 taxes, and $299.31 penalty and interest on the '93 and '94 tax at the rate of 10% per annum from the time the same became due until

the present date, said interest amounting at this date to $—. In each of the years 1892, '93 and '94, the Board of Councilmen of the City of Frankfort, levied a tax for city purposes upon all of the taxable property of the city as follows: For 1892, $1.25 per hundred dollars; for 1893, $1.30 per hundred dollars; for 1894, $1.40 per hundred dollars. In each of said years the taxable property of the defendant within said city was regularly and legally assessed for taxation for city purposes as follows: 1892, notes, money,
8 choses in action and other property all of the value of $100,000.00; 1893, franchise valued at $109,246.31; 1894, franchise valued at $112,278.91, the total tax being $4,243.10.

The assessment for 1892 was made by the tax collector of the city of Frankfort, pursuant to section 123 of the city charter; the assessments for 1893 & '4 were made by the State board of assessment pursuant to article 3 of the general revenue law. Each of said assessments were regularly certified as required by law to the tax collector of the city of Frankfort and returned by him no property found from which to make the said taxes, penalties, or interest. The tax for '93 became due July 1st, 1893; that for '94 became due July 1st, 1894. No part of said taxes, penalty or interest has been paid although legally demanded by the tax collector.

Wherefore plaintiff prays that they recover of defendant the sum of $4,243.10 taxes, $299.31 penalty, and interest upon $1,421.20, "'93 tax," from July 1st, 1893, until paid, and upon $1,571.90, "'94 tax," from July 1st, 1894, until paid, at the rate of 10% per annum, and for an attachment against the property of defendant. Plaintiff prays for costs and all proper relief.

HUGH RODMAN, *City Att'y*,
W. H. JULIAN, *Att'ys.*

Ira Julian, mayor, says he believes the foregoing statements to be true.

IRA JULIAN, *Mayor.*

Sworn to and subscribed before me this the 22nd day of August, 1894.

C. E. JAMES,
D. C., F. C. C.

9 *Summons.*

Equity summons.

The Commmonwealth of Kentucky to the sheriff of Franklin county, Greeting:

You are commanded to summon the Deposit Bank of Frankfort to answer, on the first day of the next September term of the Franklin circuit court, a petition in equity filed against it in said court by the Board of Councilmen of the City of Frankfort, and warn it that upon failure to answer, the petition will be taken for confessed, or it will be proceeded against for contempt, and you will make due

return of this summons on the first day of the next September term of said court.

Witness, Thos. B. Ford, clerk of said court, this 22nd day of August, 1894.

THOS. B. FORD, *Clerk*,
By C. E. JAMES, *D. C.*

(Endorsed:) Executed on Ben Milam, president of Deposit bank, by delivering him a copy of the within summons, this August 22nd, 1894. R. D. Armstrong, F. S. C.

Order.

Franklin Circuit Court, Sept. 20th, 1894.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Plaintiff,
vs.
DEPOSIT BANK OF FRANKFORT, Defendant. } Order.

The defendant filed its demurrer to the plaintiff's petition herein.

10 *Demurrer.*

Franklin Circuit Court.

Filed Sept. 20th, 1894.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Plaintiff,
vs.
DEPOSIT BANK OF FRANKFORT, Defendant. } Defendant's Demurrer to the Petition.

The defendant demurs to the plaintiff's petition herein because the same does not state facts sufficient to constitute a cause of action.

FRANK CHINN,
For Defendant.

Order: Judgment and Order Filing Answer.

Franklin Circuit Court, September 27th, 1894.

SAME, Plaintiff,
vs.
SAME, Defendant. } Order.

The demurrer to the petition being heard, said demurrer is sustained as to the taxes claimed for 1892, and as to all penalties and interest claimed on taxes for 1893 and 1894, and leave is given plaintiff to amend its petition as to said taxes for '92 and penalties and interest for taxes of '93 and 1894, but plaintiff declining to

amend but electing to stand by its petition the said petition is dismissed in so far as it seeks to claim any taxes from defendant for 1892 or any penalties or interest on any taxes for 1893–1894. To all of which plaintiff excepts.

11 And said demurrer is overruled as to the taxes claimed for 1893 and 1894, to which defendant excepts.

And thereupon defendant filed its answer.

Answer of Defendant.

Franklin Circuit Court.

Filed Sept. 27th, 1894.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Plaintiff,
vs.
DEPOSIT BANK OF FRANKFORT, Defendant.
} Answer of Defendant.

Par. 1st. The defendant Deposit Bank of Frankfort denies that it is indebted to the plaintiff Board of Councilmen of the City of Frankfort in the sum of $4,243.10 taxes, or $299.31 penalty, or in any part of either of said sums alleged as taxes and penalties; denies that it is indebted for interest on the '93 or '94 alleged tax at the rate of 10% *per cent.* per annum from the time the same became due until the present date, or at any other rate, or for any other time, and denies that any such alleged interest amounts to $—, or any other sum; denies that in each or either of said years 1893 or 1894 this defendant was the owner of any property which was or is assessible or taxable by the city, and denies that any property of defendant was regularly or legally or at all assessed for taxation for city purposes at $100,000 for 1892, or its franchise for 1893 at

12 $109,246.31, or its franchise for 1894 at $112,278.91, and denies that the alleged total tax amounts to $4,243.10, as alleged; denies that any of the defendant's property was subject or liable for city taxes for 1892, and denies that the tax collector of the city had any right or authority to assess any of defendant's property, or that he did assess it for taxation for 1892; denies that the alleged assessments for 1893 or 1894, or either of them, was *or* certified as required by law to the city tax collector; and denies that the said alleged taxes or assessments were returned by the tax collector no property found to make said taxes, penalties or interest; denies that the alleged tax for 1893 became due July 1st, 1893, or at any other time, or that for 1894 became due July 1st, 1894, or at any other time.

Par. 2nd. Further answering, the defendant says it is a corporation created by an act of the General Assembly of the Commonwealth of Kentucky entitled "An act to incorporate the Deposit Bank of Frankfort," approved March 3rd, 1863, under which act this defendant was duly organized and constituted as such corporation under

its said corporate name "Deposit Bank of Frankfort," and begun the business of a bank as authorized by its said charter in 1898, and has since then been continuously engaged in said business under the authority of said act and the amendments thereof which are hereinafter set out.

By the terms of said act this defendant was authorized to transact the general business of a bank for the period of twenty years from March 3rd, 1863. Said act was amended by an act of said assembly entitled "An act to amend the charter of the Deposit Bank of Frankfort," approved March 8, 1871, which amendment provides,

13 "that the tax or bonus now paid by said bank (meaning this defendant) in future shall be in full of all taxation. But this shall not apply to the city tax on real estate owned by it." The tax or bonus above referred to, was the fifty cents on each one hundred dollars' worth of its capital stock then paid by the defendant under the laws of the — in force at that date.

By another act of said General Assembly approved February 23rd, 1882, entitled "An act to extend the charter of the Deposit Bank of Frankfort," all the privileges and franchises granted to defendant by said act of March, 1863, as amended by the act of March 17th, 1871, were extended and continued in force for the period of twenty years from March 3rd, 1882.

Defendant has not owned nor has it had in its possession either in its own right or as agent for any one else any real estate or any other tangible property, which is or was assessible in kind for taxation for either of the years 1892, 1893 or 1894, for any purpose whatever, either State, county or municipal.

Defendant avers that it continued to pay annually to the State of Kentucky fifty cents on each one hundred dollars' worth of its capital stock in lieu of all tax or bonus against defendant until the act of the said General Assembly approved May 17th, 1886, entitled "An act to amend the reve- laws of the Commonwealth of Kentucky," went into effect. The first section of the second article of that act has this provision:

14 "That shares of stock in State and national banks and other institutions of loan and discount, and in all corporations required to be taxed by law on their capital stock, shall be taxed 75 cents on each share thereof equal to one hundred dollars of stock therein owned by individuals, corporations or societies, and said banks, institutions and corporations shall in addition pay upon each one hundred dollars of so much of their surplus, undivided profits or undivided accumulations, as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county and municipal."

The next section of said act gives to the auditor of the State power to investigate the books of the corporations described in the section above quoted, and pronounces penalties upon the officers managing them for refusal to allow investigation of their books for the purposes of assessment. The said act then makes it the duty of the cashier of every incorporated bank whose stocks are taxed by said

act to report on the first day of July of each year the amount of stock and how the same is invested and pay to the treasurer of the State the amount of tax due from the bank. Section four of said act reads as follows:

"That each of said banks, institutions, and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said
15 tax, and agree to pay the same as herein provided, and to waive or release all rights under acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of each bank and delivered to the governor of this Commonwealth; and upon such agreement being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such bank."

Defendant avers that by its proper corporate authority, and with the consent of a majority in interest of a quorum of its stockholders, at a called meeting thereof, held at the said bank on the — day of July, 1887, it did give its consent to the levying of said tax of 75 cents on each share of its capital stock equal to one hundred dollars in value and agreed to pay the same together with the same tax as is assessed on real estate upon so much of its surplus, &c., as exceeds an amount equal to 10% of its capital stock, as in said act provided, and further agreed to waive and release all rights under its charter to a different mode or *smaller* rate of taxation. Which consent to and with the State of Kentucky was evidenced by writing executed by the defendant under its corporate seal, and delivered by defendant to the governor of this Commonwealth on the — day of July, 1887.

Defendant avers that it has annually since the above-recited act become a law, through its cashier, reported under
16 oath on the first day of July of each year, up to and including July, 1892, to the auditor of public accounts a true amount of its capital stock, surplus, and undivided profits and undivided accumulations, and how such undivided profits and undivided accumulations were invested, and has annually up to and including July, 1892, paid into the treasury of the Commonwealth the whole of the tax due from defendant as required by said act. On the first days of July, 1893, and 1894, plaintiff tendered and offered to make the aforesaid report to the auditor, and to pay the full amount of tax required by said act for the years 1893 and 1894, to wit: 75 cents on the $100 dollars' worth of its capital stock, and upon so much of its surplus, undivided profits or undivided accumulations as exceeded an amount equal to 10% of its capital stock, the same rate of taxation that was assessed upon real estate for those years, but the said auditor refused to accept the said report and the said payments, upon the ground that he had then no authority to accept the same, claiming that the act of May 17th, 1886, had been repealed

by the act of the legislature of Kentucky which became a law without the approval of the governor, on the 11th day of November, 1892.

Defendant avers that the said act of November 11th, 1892, was passed without the consent and against the will of the defendant, and in so far as it attempts to repeal the defendant's said contract under the act of May 17th, 1886, and impose upon defendant a liability for county and municipal taxation, is an attempt to impair the obligations of the defendant's aforesaid contract under
17 the act of May 17th, 1886, and is utterly void and of no effect, being in violation of *of* the constitution of Kentucky ,and in violation also of section 10, article 1 of the Constitution of the United States, which prohibits the enactment of laws by any State impairing the obligations of contracts.

Defendant avers that it has complied with all the terms and conditions required of it by the aforesaid act of May 17th, 1886, and that it has by the terms of said act, a contract with the State of Kentucky, which is irrepealable by the said State, during the corporate existence of this defendant, and which contract provides, that upon the acceptance by defendant of the terms and conditions of said act, this defendant and its shares of stock "shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of this defendant.

And defendant avers that in the suit of this defendant against Franklin county heretofore decided by this honorable court it was decided that the defendant's charter as amended, constituted an irrevocable contract between this defendant and the State of Kentucky by the terms of which this defendant was required to pay annually to the treasurer of Kentucky fifty cents on each $100 worth of its capital stock in full of all tax or bonus, and that this defendant nor its capital stock could be made liable for any other tax or bonus. Which decision was appealed to the court of appeals of Kentucky and affirmed by said court (see opinion in 87 Kentucky Reports, page 375). The papers and proceedings in said suit are here referred to as part hereof, together with the mandate and opinion of the court of appeals on file therewith.

18 By the terms of the act of November 11th, 1892, above referred to, it is provided that all banks and other corporations, besides the taxes to the State treasury therein provided for, should also pay the *the* counties and cities in which they may be situated or doing business, taxes not only on all their tangible property located in such counties and cities, but also on the "franchise" of such corporations, by which term is meant all the other property and assets of the corporations; that said county and municipal taxation shall be at the same rate at which other property is assessed or taxed.

Defendant avers that the property attempted to be subjectad to municipal taxation in this suit, is all intangible property, and was reported by defendant to the State board of assessment and valuation, and was by said board estimated and included in said board's assessments and valuations of this defendant's franchise for the years 1893 and 1894.

Defendant alleges that notwithstanding it was compelled to and did pay the treasurer of Kentucky on the first day of July, 1892, the full amount of tax due from it to the State under the terms of its said contract with the State, known as the Hewitt bill, the plaintiff is demanding in this suit from defendant taxes for the year 1892 upon the same property upon which defendant paid taxes for that year to the State. And is in addition claiming taxes upon the alleged assessment and valuation of defendant's franchise, the county of Franklin is claiming against defendant taxes for county purposes
for the years 1893 and 1894, which said sums claimed for local
19 taxes when added to the amount paid by the defendant to the State of Kentucky for each of these years will make an amount largely in excess of the amount that could be claimed of this defendant under the said act of May 17th, 1886.

Defendant avers that the State board of assessment and valuation had no power or authority to make any assessment or valuation of defendant's franchise, and the plaintiff has no right or authority to demand, collect or receive any taxes from defendant or any penalty or interest for non-payment of any taxes.

Wherefore defendant prays that the petition be dismissed; that the defendant's contract under the Hewitt bill be sustained, and declared valid and binding by the court; that the plaintiff be enjoined and restrained from assessing or attempting to assess, and from collecting or attempting to collect from defendant any tax upon defendant's property or franchise, except upon any real estate defendant may hereafter acquire, if any; and it prays for costs and for all other proper relief.

FRANK CHINN,
For Defendant.

B. Milam says he is president of the Deposit Bank of Frankfort, and he believes the statements in the foregoing answer contained are true.

B. C. MILAM,
President Deposit Bank of Frankfort.

Sworn to before me by B. Milam, this 20th day of September, 1894.

U. KEENON,
Notary Public.

20 *Judgment Cir. Ct.*

Franklin Circuit Court, Feb'y 1st, 1896.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Plaintiff,
vs.
DEPOSIT BANK OF FRANKFORT, Defendant. } Judgment.

It appearing to the court that this action has been continued and not heretofore submitted, by agreement between the plaintiff and

defendant by their respective attorneys, that this action should stand upon the answer filed by the defendant, until the decision by the court of appeals in the two cases appealed from this court, in one of which the defendant bank was plaintiff and the county of Franklin, &c., were defendants, and in the other the Commonwealth for the use of said county was plaintiff and the defendant bank was defendant, and the liability of the bank for the taxes claimed in this case should be settled and determined by the decision of the court of appeals in said two cases, the defense relied on in this case being the same contract set up and relied upon by the bank in those two cases; and it further appearing to the court by the mandates and opinions of the court of appeals filed in said two cases, that the court of appeals has sustained the defense set up and relied on by the bank in said two cases based upon the contract made by the bank under the Hewitt bill, which is the same contract relied on as a defense in this case: it is now ordered and adjudged that art. 2 of the act of the General Assembly entitled, "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17th,
21 1886 (General Statutes, chap. 92, art. 2), and the acceptance of the provisions thereof by the defendant constituted a contract between the defendant and the Commonwealth which the latter cannot alter or change without the consent of the former; by the terms of which contract the defendant cannot, during the continuance of its charter, be assessed for taxation, or taxed for State purposes in a different mode or at a greater rate of taxation than as provided for in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon any real estate it may own; that the provisions of the present constitution of this State and of the act of Nov. 11th, 1892 (art. 3, chap. 103, Acts 1891–'2–'3), in so far as they were intended to provide for any assessment or taxation of the defendant's property, rights of property or franchise except its said real estate, are in violation of, and repugnant to, the Federal Constitution and void: that the board of valuation and assessment provided for in said act of November 11th, 1892, had and has no authority in law to assess or value the defendant's franchise for taxation, or the auditor to apportion or certify the same or any part of the same, for county or municipal taxation; that the temporary injunction which was prayed for in this case at the commencement of the action be and the same is now hereby granted, and the defendants be and each of them are perpetually enjoined and restrained from levying upon or selling any property of the defendant for the purpose of collecting any taxes for the city of Frenkfort upon *upon* the franchise or property of the defendant, except upon its
22 real estate. And it is further adjudged that the defendant recover of the plaintiff its costs in this action expended. To all of which the Board of Councilmen of the City of Frankfort except, and pray an appeal to the court of appeals, which is granted.

Clerk's Certificate.

STATE OF KENTUCKY, } *sct:*
County of Franklin, }

I, Thos. B. Ford, clerk of the Franklin circuit court, certify that the foreging 16 pages contain a true and complete transcript of the case of The Board of Councilmen of the City of Frankfort *v.* Deposit Bank of Frankfort, as appears from the records of the Franklin circuit court.

Witness my hand, as clerk of said court, this June 13th, 1898.

THOS. B. FORD,
C. F. C. C.,
By J. R. ELLIOTT, *D. C.*

23 And afterwards at a court of appeals held in and for the Commonwealth of Kentucky, at the capitol in Frankfort, on the 26th day of October, 1898, the following order was entered:

Motion to Dismiss.

BOARD OF COUNCILMEN OF FRANKFORT }
vs.
DEPOSIT BANK OF FRANKFORT. }

Came appellant by counsel in this case and filed grounds and moved the court to be permitted to file a statement of points relied on and order an oral argument.

The appellee in this case by counsel filed grounds and moved the court to dismiss the appeal herein. The cause is submitted on the said motions. Appellee objected to appellant's motion and appellant to appellee's motion.

Afterwards at a court of appeals held as aforesaid on the 18th day of November, 1898, the following order was entered herein:

Order Overruling Motion to Dismiss Appeal & Order Sustaining Motion for Oral Argument.

The court being sufficiently advised it is considered that the motion to dismiss the appeal herein be overruled and the motion of appellant to pass for oral argument is sustained.

Afterwards at a court of appeals held as aforesaid on the 6th day of June, 1899, the following order was entered herein, to wit:

Came the parties by counsel and on motion and by consent this case is submitted with sixty days' leave to file brief.

24 Afterwards at a court of appeals held as aforesaid on the 19th day of June, 1900, the following judgment was entered herein: (Chief Justice Hazelrigg, Judges Paynter, Burnam and Hobson sitting.)

Judgment Ct. Appeals.

BOARD OF COUNCILMEN OF CITY OF FRANKFORT, Appellant, *vs.* DEPOSIT BANK OF FRANKFORT, Appellee.	Appeal from Franklin Circuit Court.

The court being sufficiently advised it seems to them that the judgment herein is erroneous. It is therefore considered that said judgment be reversed and cause remanded for further proceedings not inconsistent with the opinion herein. Which is ordered to be be certified to said court. It is further considered that the appellant recover of the appellee its costs herein expended. On the same day, to wit: June 19, 1900, the court delivered the following opinion:

Opinion.

Court of Appeals of Kentucky, June 19th, 1900.

To be reported.

BOARD OF COUNCILMEN OF CITY OF FRANKFORT, Appellant, *vs.* DEPOSIT BANK OF FRANKFORT, Appellee.	Appeal from Franklin Circuit Court.

Opinion of the court by Chief Justice Hazelrigg.

This action was brought in August, 1894, by the City of Frankfort against the Deposit Bank for taxes alleged to be due the
25 plaintiff for the years 1892, 1893 and 1894. A demurrer was sustained to the petition so far as it sought to enforce a collection of the taxes of 1892 and the penalties and interest, and the plaintiff declining to plead further in respect to these items, the petition to such extent was dismissed. This was in September, 1894, and there has been no appeal from that judgment.

The bank then filed its answer as to the years 1893 and 1894 relying solely on its alleged contract with the State under the Hewitt law.

This answer was filed in September, 1894, and nothing further appears to have been done in the case until on February 1st, 1896, when a judgnent was rendered upholding the defense set up in the answer, on the authority of the construction given to the Hewitt law by this court in the Bank-tax cases of June, 1895.

The city excepted to this judgment and prayed an appeal to this court. It did not prosecute this appeal, but sued out an appeal from this court on the 14th of January, 1898, and now asks a reversal of the judgment of February 1st, 1896, on the authority of the Bank-tax cases of March 24, 1897. (17 R. 245.)

It is due the trial court to note that the judgment complained of

was rendered in pursuance of the majority opinion of this court of June 1895 sustaining the contract claimed by the bank under the Hewitt law.

This court in 1897 overruled the opinion of 1895, and it
26 would seem to follow necessarily that the judgment in this case should be reversed.

This would probably be conceded except that it is recited in the judgment complained of in substance that the parties by their attorneys agreed to let the case await the decision of the court of appeals in certain cases the same bank and the county of Franklin had pending in this court and which involved the same defense, it being recited that the liability of the bank in the city case should abide the result of those two cases. But this recitation, it seems to us, is not conclusive of such an agreement where there is an exception to the judgment. The exception must be taken to apply to every recitation in the judgment where it is called in question directly on appeal. If the judgments were attacked collaterally, it might be that such recitations would be taken as true. A complaining party can do no more than except to a judgment and that he may do even if the court recites that he consents thereto. Whilst an exception is not necessary to secure the benefit of an appeal still the office of an exception in a case like this serves to nullify the effect of the recitation that the complainant consented.

In the absence of a plea setting up an agreement, we cannot restrict the effect of the exception secured by the complainant to certain parts only of the judgment.

Under the authority of the tax decision of 1897, the answer of the bank is not good, and the judgment denying the city the right to collect the tax on the grounds set up in answer is erroneous.
27 It is noticeable that the petition of the city was not dismissed, still we think the judgment appealed was in substance a final order.

Reversed for further proceedings not inconsistent with this opinion.

Frank Chinn, for appellee.
W. H. Julian, Ira Julian, T. H. Crockett, for appellant.

Order Extending Time for Filing Petition for Rehearing.

Afterwards on the 13th day of July 1900 the following order was made: The time for filing petition for rehearing in this case is hereby extended until the 1st day of the September term 1900. This July 13th, 1900.

JAMES H. HAZELRIGG, *Judge.*

Afterward at a court of appeals held as aforesaid on the 17th day of September 1900 the following order was entered herein:

Came the appellee by counsel and filed a petition herein and moved the court to grant a rehearing and the cause is submitted on the petition and motion.

The following is the petition for rehearing filed by the foregoing order:

Order Filing Petition for Rehearing.

28 Court of Appeals of Kentucky.

BOARD OF COUNCILMEN OF CITY OF FRANKFORT, Appellant,
v.
DEPOSIT BANK OF FRANKFORT, Appellee. } Petition for Rehearing.

Petition for rehearing.

Since this case was submitted, a litigation between this bank and the city in the United States court has terminated, and as no previous opportunity to acquaint this court with that litigation has been offered, the facts concerning it will be given here before beginning a discussion of the question upon which the case was reversed.

This bank, the bank of Ky. and Farmers' bank filed suits in the circuit court of the United States against the board of valuation and assessment of Kentucky, the county of Franklin and city of Frankfort, to enjoin that board from assessing, and the city and the county from collecting taxes from those banks, upon the ground that they had a contract under the Hewitt bill and that such contract had been upheld by the courts of Kentucky. The entire record in the case at bar, and in the suit against the county, were made parts of this bank's petition and copies filed as exhibits. After the fullest hearing before Justice Harlan, and Judges Lurton and Tafft, that court entered a judgment as prayed for, enjoining all the above-named parties, the board from assessing, and the city and county from collecting or attempting to collect taxes from the bank. The city appealed from that judgment to the Supreme Court, by which
29 it was affirmed. The *judgment under review in this case, was also in review in that case, and every objection here argued against it,* was argued in that court without avail. 174 U. S. page 412.

That litigation was supposed by everybody to finally settle the question of the right of the city to tax those three banks, and the last legislature, upon that idea, and for that reason alone, repealed the charters of all three of those banks. That repeal went into effect May 1st last, and this bank on that day went out of business and accepted the repeal without resistance, and a new bank with a name somewhat similar, was organized under the State law, which makes no claim to any kind of exemption.

The opinion places the reversal upon the ground that the agreement recited in the judgment, ought not to be conclusive upon the city in the absence of a plea setting it up. We beg the court to reconsider this opinion for these reasons:

First. Because it would be a fraud upon the bank for the city

now to renounce the agreement after it has had the benefit of it. Let us look at that question: No step was taken in this suit in the circuit court after the answer was filed Sept. 27th, 1894 until the judgment appealed from was rendered Feb'y 1st 1896. That court had just before that time held the claim of the bank to a contract under the Hewitt law to be invalid, in the suit of the bank against the county, and the answer in so far as it asserted that claim was sure to be held bad on demurrer, and the counsel for the city had only to call the matter up in court to entitle them to a judg-
30 ment on that paragraph. The litigation had thus progressed to the very point where the city could secure a judgment for all it asked, for the asking. If there had been no agreement, the city would certainly — taken its judgment at the first possible moment, and the bank would have appealed to this court, and its appeal would have been heard with the cases decided by Judge Pryor, as its appeal against the county was, and its rights thereby finally determined, and this appeal would have been impossible, or at least unavailing. We submit respectfully that the city ought not to be allowed to question the agreement under these circumstances.

But it is to be noticed that the city has nowhere denied either the validity of effect, of the agreement, and this court is asked to disregard it upon the mere suggestion by the counsel who happen now to represent the city, that "they" did not make the agreement. The agreement is a matter of record, and is for that reason, if for no other, entitled to greater weight than the statement of counsel in argument, and not even under oath.

It may be true in some cases, as stated in the opinion "that a complaining party can do not more than except to a judgment against him," but in a case like this, he ought to, and would have done more, if there had been any intention of calling the agreement in question. If the counsel for the city had not made the agreement, and made it exactly as stated in the judgment, they would have objected to the entering of the judgment and upon their denial that they had agreed as stated the court would most certainly have refused to allow the paper to be entered. We submit
31 therefore that there can be no good reason for requiring the bank to plead the agreement, since the only office of the plea would be to advise the city of the fact, and that fact was peculiarly within the knowledge of its counsel, and is conclusively established by the record.

It cannot be presumed that the court would deliberately enter a judgment reciting an agreement of attorneys vitally affecting the case, when no such agreement had been made; and if the agreement *is a mistake*, it is a mere *clerical error* and the *remedy* is by *motion* in the *lower court to correct it*. The recitals of the court records as to agreements of counsel are universally treated as conclusive on appeal. An exception to the judgment reciting the agreement, does not raise the question as to whether the agreement was made. It is inconceivable that counsel for the city would have satisfied themselves with a mere exception to the judgment if the

recital as to the agreement made by them was either a fraud or mistake, and surely if not true, it was one or the other.

The fact that the *agreement is recited*, and that the *judgment is based on that recital, shows clearly the purpose of the exception.* The *agreement is admitted*, and the *question is submitted to the court as to whether that agreement authorizes the judgment for defendant.* The court finds that it does, and to that finding counsel for the city except. And this court, though of opinion that the agreement was sufficient to authorize the judgment, reverses that judgment because the
32 agreement was not pleaded. Believing that the opinion is a departure from the established rule that the recitals of record as to agreements between counsel are conclusive on appeal, a rehearing is earnestly asked.

FRANK CHINN,
For Appellee.

Afterward at a court of appeals held as aforesaid on the 20th day of September 1900 the following order was made herein:

Order Filing Response to Petition.

Came appellant by counsel and filed a reply to the petition for rehearing herein.

The following is a copy of the reply filed by the foregoing order.

Response to Petition for Rehearing.

Court of Appeals of Kentucky.

BOARD OF COUNCILMEN OF THE CITY OF Frankfort, Appellant,
vs.
DEPOSIT BANK OF FRANKFORT, Appellee.
} Response to Petition for Rehearing.

Any such agreement as that asserted by appellee should have been and would have been, in writing and filed and made a part of the record.

It is conceded that no such agreement is contained in the record, and that there was no such agreement filed or in writing.
33 But, even if there had been such an agreement in writing, and it had been filed and made a part of the record, the same would be unavailable herein and void. Supreme Court, U. S., so held since this case was submitted. Stone, auditor, *vs.* Bank of Commerce, 174 U. S., 413. In regard to such agreements, the Supreme Court, in that case, said:

"It is quite plain that it embraced more than the attorney had the right to bind the city to, even if an action had then been commenced and the agreement had been made in that action."

In another connection, language of opinion by Supreme Court, in said case, as to such agreements, is as follows:

"This agreement was not in the execution of the general power of an attorney to decide upon the proper conduct of a suit then on its way through the courts. It was an agreement much more than that, and of a different nature. As we have said the question to be determined was one of policy, as well as law; eminently one for the consideration of the city authorities, its mayor and its general council, aided and assisted by the advice of the attorney of the city. It was a decision of a corporate nature, and not one to be decided by any but the corporation." (Municipality.)

So, in this case—the determination of the question whether or not the city would wager its right to tax the appellee bank upon
34 the result of another case to which the city was not a party, and in the management of which the city had no control, "was a decision of a corporate nature and not one to be decided by any but the corporation."

That the allowance of such agreements, as legal and binding upon the city, would be against public policy, is obvious. Such would place immense interests of the city at the disposal of the city attorney, without advice, counsel or authority from the city.

Where there is a case pending between certain parties, involving an ordinary question, and there is at — same time pending another case between the same parties involving the same question, it is within the general powers of attorneys to agree that the common question may be litigated and determined in one of said cases. But, the city of Frankfort was not a party to the case of Franklin County *vs.* Deposit Bank, nor were the interests involved such that an attorney could dispose of same without special authority from the city.

Said decision by the supreme court, holding such agreements void, having been rendered since the submission of this case, same was not referred to in brief for appellant city.

That adjudication eliminates from this case the entire subject of "*agreement*," and renders the recital, in the judgment appealed from, immaterial—same being void.

It were easy, however, to show that said "recital" is not conclusive. On that subject see Carlton *vs.* Miller, 21 S. W. 697; Nasworthy *vs.* Draper, 28 S. W. 564; Tonkey *vs.* Keyes Silver Min. Co., 31 p. 57.

Otherwise, any judgment depending upon matters of fact
35 could be sustained by improper recitals therein. There would be no remedy, to the injured party, against such recitals.

As to any litigation between appellant and appellee in the Federal courts, referred to in petition for rehearing, the record herein shows nothing. Same will be considered herein, if at all, only as authority. In said litigation, only two questions were involved, namely; 1st, whether or not art. 2 of Hewitt law constituted an irrevocable contract between the bank and the State? and 2nd, whether or not an unreversed judgment of a State circuit court operated as an estoppel?

The first of said questions was decided by Supreme Court U. S.

adversely to the appellee bank. The second said question was decided (by an equally divided court, one justice not sitting) in favor of appellee. This case does not involve any question of estoppel. This case involves only the first of said questions (as to irrevocable contract).

Appellee must now concede that it was not protected by any such contract, and consequently must concede that the taxes in controversy are due and unpaid, and that the same in equity and good conscience, ought to be paid.

This cause being in equity, the chancellor will do justice between the parties hereto, in so far as the rules of equity jurisprudence will permit.

We respectfully submit that the petition for rehearing should be overruled, and the court below directed to render judgment for the taxes in controversy.

T. H. CROCKETT, *City Att'y,*
IRA & W. H. JULIAN,
For Appellant.

36 Afterwards at a court of appeals held as aforesaid on the 18th day of December 1900 the following order was entered herein:

Order Filing Court's Response to Petition.

The court being sufficiently advised, delivered a response and the petition for rehearing herein is overruled.

The following is a copy of the response delivered by the court and filed by the foregoing order.

Response to Petition for Rehearing.

Court of Appeals of Kentucky, Dec. 18th, 1900.

(To be reported.)

BOARD OF COUNCILMEN OF CITY OF FRANKFORT, Appellant,
vs.
DEPOSIT BANK OF FRANKFORT, Appellee.
} Appeal from Franklin Circuit Court.

Response to petition for rehearing by Judge Hobson.

Section 386 of the Civil Code provides:

"Judgment shall be given for the party whom the pleadings entitle thereto, though there may have been a verdict against him."

It has been accordingly often held that a judgment not warranted by the pleadings must be reversed (Maddox *vs.* Fox, 8 Bush, 402). The agreement recited in the judgment was not pleaded and on the face of the pleadings as they stood judgment should have been entered for appellant under the express mandate of the statute.

37 But if the agreement relied on had been put into a plea in bar of the further prosecution of the action, it would have been in effect this: That the attorney of appellant and the attorney of appellee had agreed *in pais* that the result of this suit should depend upon the result of another suit which was then pending to which the city was not a party and in which a judgment was rendered afterwards contrary to the contention of the city in this case. If such a plea had been filed it would have been bad on demurrer, for the city not being a party to that suit and having no right to be heard there by witnesses or counsel, its attorney had no authority without its consent thus to tie it hands in the assertion of its legal rights. This precise question was presented to the United States Supreme Court in the bank-tax cases, 174 U. S., 413, where the court speaking of an agreement like this made before the suit was filed, and criticising a decision upholding such an agreement by an attorney after the suit was filed, said:

"As we have said the question to be determined was one of policy as well as law; eminently one for the consideration of the city authorities, its mayor and its general council aided and assisted by the advice of the attorney of the city. It was a decision of a corporate nature, and not one to be decided by any but the corporation."

It is well settled in this State that an attorney has no power to compromise his client's suit. (Smith *vs.* Dixon, 3 Met., 442; O'Riley *vs.* Call, 7 Ky. Law Rep., 516; Lexington etc. Co. — Wellburn, 11 Ky. Law Rep., 307.) The agreement relied on of the attorney out

38 of court in *in* this case is much more objectionable than a compromise outright of the suit. It was substantially a wager by the attorney of the city's right to tax appellee upon the result of another suit to which the city was not a party and in the management of which it had no control. The power of taxation exercised by the cities of the State is a sovereign power and cannot be lost in this way.

It is earnestly argued for appellee that the city should not be allowed to escape now from the agreement made by the attorney, for the reason that if this agreement had not been made and acted on by appellee it would under the previous decision of this court which had not been overruled have then obtained a judgment in its favor releasing it from the payment of the taxes in controversy. There is plausibility in this argument, but no merit, as it seems to us. For if such a judgment had been rendered the city might within two years thereafter have prosecuted an appeal from it and obtained a reversal as was in fact done in other cases. Besides, the constitution requires all property to be taxed equally. Equality of taxation is essential to any just system. So far as any tax-payer escapes, an additional burden is laid upon the shoulders of others.

The sum of appellee's contention is, therefore, that it is pre-

39 vented from taking advantage of an error in the administration of justice and from thus compelling other tax-payers to bear its part of the common burden.

The petition is overruled.

Frank Chinn, for appellee.

W. H. Julian, Ira Julian, T. H. Crockett, for appellant.

Be it remembered that heretofore to wit: on the 19th day of March 1901 the appellant The Board of Councilmen of Frankfort by its attorney filed in the clerk's office of the court of appeals of Kentucky a transcript of record in words and figures following, to wit:

40 *Mandate of Court of Appeals.*

Franklin Circuit Court.

Filed Dec. 19, 1900.

THE COMMONWEALTH OF KENTUCKY, *The Court of Appeals.*

JUNE 19, 1900.

BOARD OF COUNCILMEN OF FRANKFORT, Appellant, *against* DEPOSIT BANK OF FRANKFORT, Appellee. } Franklin.

The court being sufficiently advised, it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed and cause remanded for further proceedings not inconsistent with the opinion herein.

Which is ordered to be certified to said court.

A copy. Attest: S. J. SHACKELFORD, *C. C. A.*, By ROB'T L. GREENE, *D. C.*

Issued Dec. 18, 1900.

41 *Notice of Filing of Mandate of Court of Appeals.*

Franklin Circuit Court, Dec. 20, 1900.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Pl't'ff, *vs.* DEPOSIT BANK OF FRANKFORT, Def't. } Notice.

The defendant, Deposit Bank of Frankfort, is hereby notified that the mandate of the court of appeals in the above-styled cause (same case in court of appeals being styled B'd of Councilmen, appellant, *v.* Deposit Bank of Frankfort, appellee) was this day filed in the clerk's office of the Franklin circuit court.

W. H. JULIAN,
Att'y for Pl't'ff, City.

(Endorsement:) Executed on the Deposit Bank of Frankfort by delivering to J. Buford Hendrick, president of said bank, a true copy of the within notice this Dec. 20, 1900. B. F. Suter, S. F. C.

42 *Affidavit of J. Buford Hendrick.*

Franklin Circuit Court, Jan. 17, 1901.

BOARD OF COUNCILMEN OF THE CITY OF Frankfort, Plaintiff,
vs.
DEPOSIT BANK OF FRANKFORT, Defendant.
} Affidavit of J. Buford Hendrick.

Affiant, J. Buford Hendrick, says that the charter of the defendant Deposit Bank of Frankfort was repealed by an act of the General Assembly of the Commonwealth of Kentucky, entitled an "Act to repeal certain State bank charters," approved March 22nd, 1900, which repeal went into effect on May 1st, 1900, on the failure of said bank to comply with the agreement as to payment of taxes referred to in said act, and the affiant was not therefore president of said bank on the — day of December, 1900, when the notice of filing a mandate of the court of appeals was served on him as such president.

J. BUFORD HENDRICK.

Subscribed and sworn to before me by J. Buford Hendrick this 8th day of January, 1901.

U. KEENON,
Notary Public, Franklin County, Kentucky.

My commission expires Jan'y 14, 1904.

43 *Order.*

Franklin Circuit Court, Jan. 17, 1901.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Plaintiff,
vs.
DEPOSIT BANK OF FRANKFORT, Defendant.
} Order.

This day came J. Buford Hendrick, who enters his special appearance herein for the purpose of filing his affidavit, and for no other purpose, and filed his affidavit, and suggested the repeal of the charter of the defendant Deposit Bank as stated in his said affidavit.

44 *Response to Affidavit.*

Franklin Circuit Court, Jan. 22, 1901.

BOARD OF COUNCILMEN OF THE CITY of Frankfort, Pl't'ff, *vs.* DEPOSIT BANK OF FRANKFORT, Def't. } Response to Affidavit Filed Jan. 17, 1901.

For response to the affidavit of J. Buford Hendrick, filed herein on Jan 17th, 1901, pl't'ff says:

'Tis true that the charter of def't bank was repealed May 1st, 1900, and J. Buford Hendrick was not president of def't bank on Dec. 20th, 1900, when the notice of filing mandate and opinion was executed upon him. But said Hendrick was president of def't bank when the charter thereof was repealed and for many months previously thereto, and was the proper person on whom to execute said notice.

T. H. CROCKETT &
W. H. JULIAN, *For Pl't'ff.*

Affiant says the statements of the foregoing response are true.
W. S. DEHONEY, *Mayor.*

Sworn to before me by W. S. Dehoney, mayor, on this Jan. 21, 1901.

T. P. TREMERE,
Exam. for F. C.

45 *Supplemental Answer.*

Franklin Circuit Court, Feb. 1, 1901.

BOARD OF COUNCILMEN OF THE CITY OF Frankfort, Plaintiffs, *vs.* DEPOSIT BANK OF FRANKFORT, Defendant. } Supplemental Answer.

By way of supplemental answer herein, reiterating all the averments of said answer and each paragraph thereof to have the same effect as if set out herein, the defendant Deposit Bank of Frankfort says the plaintiff, Board of Councilmen of the City of Frankfort, had instituted and was prosecuting a suit in this honorable court against L. C. Norman, Chas. Finley, secretary of state, and George W. Long, treasurer of the State of Kentucky, who then composed the board of valuation and assessment of Kentucky, and against this defendant, in which suit said board of councilmen of the city of Frankfort sought to compel by mandamus the said board of valuation and assessment to assess the franchise of the defendant bank for taxation, and to compel the said auditor to certify said

assessment to the clerk of the Franklin county court, which action was pending and was being pressed to trial by the plaintiff on the 17th day of April, 1897, and the said board of valuation and assessment were threatening to assess the defendant's franchise for taxation for city purposes when this defendant on the 17th day of April, 1897, filed its bill of complaint in the circuit court of the United States for the
46 circuit and district of Kentucky against the said auditor, secretary and treasurer, and against the plaintiff Board of Councilmen of Frankfort and Franklin county, in which it alleged the said board was threatening to collect taxes from this defendant bank for city purposes in violation of the said bank's contract with the State of Kentucky under the Hewitt bill, which contract is set out at length in the original answer herein. And this defendant in that suit alleged that it had in all things complied with the terms of its said contract, and by virtue thereof the defendant bank was not liable for any taxation whatever upon its franchise to the said board of councilmen during its corporate existence, and was only liable for city taxes upon any real estate it might own. The said Board of Valuation and Assessment and the said Board of Councilmen of the City of Frankfort and Franklin County were all duly served with process upon said suit, and all entered their appearance therein and made defence thereto in substance that the contract of the defendant Deposit Bank under the Hewitt law had been repealed by the act of the General Assembly of the Commonwealth of Kentucky passed — 1892. Such proceedings were had in that suit and upon that issue that a judgment was rendered by the said circuit court of the United States, which judgment sustained and upheld the bank's said contract, and adjudged that the act aforesaid of 1892 in so far as it purported to repeal the said bank's contract under the said Hewitt law to be null and void, and in violation of the Constitution of the United States. Said judgment was rendered on the 25th day of June, 1898, and amongst other things adjudged the validity of the said contract in the terms following:
47 "It is further adjudged, ordered and decreed that by reason of the several pleas of *res judicata*, relied on by the complainant in its bill and as shown by the exhibits therewith, the complainant has established a contract with the Commonwealth of Kentucky under the provisions of article 8 of the act of the General Assembly of the State of Kentucky, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17th, 1886, and the acceptance of the same by the complainant, the terms of which contract the Commonwealth cannot alter or change without the consent of the complainant; that by the terms of this contract the complainant and its shares of stock cannot, during its corporate existence, be assessed for taxation for State purposes in a different mode or at a greater rate of taxation than as prescribed in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present constitution of the Commonwealth of Kentucky and the act of November 11th, 1892, in so far as

they are intended to provide or do provide for any assessment or taxation of the complainant's property, rights of property, or franchise, or shares of stock, except to the extent and in the manner provided by sections 1, 2 and 3 of article 2 of the said act approved May 17th, 1886, and except to assess and tax for county and municipal purposes upon its real estate used in conducting its business, are in violation and repugnant to the Federal Constitution and void."

48 The said Board of Valuation and Assessment and the said Board of Councilmen of the City of Frankfort, and Franklin County prayed an appeal from that judgment to the Supreme Court of the United States, which appeal being fully heard by said Supreme Court, was affirmed on May 15th, 1899.

The defendant says it has not at any time been the owner of or in possession of any real estate in the city of Frankfort, and the taxes attempted to be collected from it in this action were not assessed upon any real estate belonging to the defendant.

By all of which defendant says plaintiff is estopped from collecting or attempting to collect taxes sued for in this action, or any part thereof from this defendant, and it pleads the aforesaid judgment of the circuit court of the United States in bar of any recovery against it in this action, and it alleges that the attempt being made on the part of the plaintiff in this action to collect the taxes sued for herein is in violation of the Constitution of the United States.

Wherefore defendant prays that the petition be dismissed and prays for costs and all other proper relief.

D. W. LINDSEY,
FRANK CHINN, *For Def't.*

49 *Demurrer to Amended Answer.*

Franklin Circuit Court, Feb. 1, 1901.

BOARD OF COUNCILMEN OF THE CITY OF Frankfort, Pl'tff, *vs.* DEPOSIT BANK OF FRANKFORT, Def't.	Demurrer to Amended Answer.

The pl't'ff Board of Councilmen demurs to the amended answer herein, because the same does not state facts sufficient to constitute or support a defense to the action.

W. H. JULIAN, *For Pl't'ff.*

50 *Reply.*

Franklin Circuit Court, Feb. 1, 1901.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Pl't'ff,
vs.
DEPOSIT BANK OF FRANKFORT, Def 't. } Reply.

Not waiving demurrer, for reply to the amended answer herein the pl't'ff Board of Councilmen says:

1st. Since the adjudication in the circuit court of the United States (before Judge Taft) and the affirmance thereof by Supreme Court of the United States, referred to and partially set forth by the amended answer herein, the judgment of the Franklin circuit court rendered in February, 1896, upon which the said adjudication in the Federal courts was wholly and entirely based, has been reversed by the court of appeals of Kentucky and the same ordered by said court of appeals to be set aside and held for naught in this court.

2nd. The said Federal court adjudication was not as to the two years' taxes in controversy herein, but was as to other years' taxes—the taxes in controversy herein being only for the years 1893 and 1894, and the said Federal court adjudication was only as to the taxes for the year 1895 and subsequent years, as is shown by the Federal court record of the case in which said adjudication was had (Stone, auditor, &c. *v.* Deposit Bank of Frankfort, and cases heard and determined therewith) which record is filed herewith as part hereof, same being printed and marked transcript of record.

The plaintiff Board of Councilmen prays as in its petition.

T. H. CROCKETT, *City Att'y,*
W. H. JULIAN, *For Pl't'ff.*

51 *Rejoinder.*

Franklin Circuit Court, Feb. 2, 1901.

BOARD OF COUNCILMEN OF CITY OF FRANKFORT, Plaintiff,
vs.
DEPOSIT BANK OF FRANKFORT, Defendant. } Rejoinder.

For rejoinder to the reply herein, the defendant denies that the adjudication of the U. S. court in the supplemental answer set up was based wholly or entirely upon the judgment of this court rendered in Feb. 1896: and denies that said adjudication was not as to the two years' taxes in controversy herein; and denies that said adjudication of the U. S. court was only as to the taxes for the years 1895 and subsequent years, but that said adjudication included by its express terms any and all taxes claimed, or attempted to be collected from defendant by or in favor of the plaintiff, for any year

or years subsequent to said adjudication, including the taxes for 1893 and 1894, claimed in this case. Wherefore defendant prays as in its answer.

D. W. LINDSEY,
FRANK CHINN,
For Defendant.

52 *Motion to File Records as Evidence.*

Franklin Circuit Court, Feb. 2, 1901.

BOARD OF COUNCILMEN OF THE CITY OF Frankfort, Pl't'ff, *vs.* DEPOSIT BANK, Def't. } Motion to File Records as Evidence.

The plaintiff Board of Councilmen moves to file as exhibits for the purpose of evidence the following record:

The entire record in the case of Sam'l H. Stone, auditor, &c. *v.* Deposit Bank of Frankfort, in U. S. circuit court for the dist. of Kentucky, in which the judgment relied on by def't was rendered.

W. H. JULIAN, *For Pl't'ff.*

53 *Order.*

Franklin Circuit Court, Feb. 2, 1901.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Pl't'ff, *vs.* DEPOSIT BANK OF FRANKFORT, Def't.

The defendant Deposit Bank filed a rejoinder.

By agreement of parties it is ordered that the above-styled case, which has been partially heard by T. L. Edelen, as special judge, be heard and determined by him, either during or after the present term of court, and his judgment therein entered as of this term of court, and the cause is now submitted for argument and judgment on the pleadings and exhibits filed.

54 *Order.*

Franklin Circuit Court, Feb. 2, 1901.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Plaintiff, *vs.* DEPOSIT BANK OF FRANKFORT, Defendant. } Order.

This day came the parties by their attorneys, and this cause coming on to be heard before the Hon. T. L. Edelen, special judge, the

plaintiff, by counsel, moved that it be allowed to file of record as exhibits and evidence the two sets of papers marked "Assessment of corporation franchises for 1894," and "Assessment of bank franchises for 1893," on the ground of belief of its counsel that the same had been filed before submission, to which defendants object and the objection is overruled, to which defendant excepts, and the said papers marked "A" and "B" respectively for identification are now allowed to be and are filed as exhibits and evidence in this cause, subject to competency of same or any part thereof, but upon condition that defendant may take any proof it may have to present, to which ruling of the court in allowing said papers to be filed the defendant excepts, and also objects and excepts to the competency of said papers and each and every part thereof. The defendant withdraws any and all objection to the exhibit filed with the reply to the supplemental answer for any want of authentication of same, but renews objection and excepts to its competency as evidence.

55 The defendant files as evidence the statement in writing of N. B. Smith, clerk of Franklin county court, which statement, by agreement of said parties is to be received and read in evidence to have the same effect as if the facts therein stated and the papers therein referred to were duly and properly and officially certified to by said Smith, or testified to by him in properly taken depositions.

Agreement.

And it is agreed between the parties that the State board of valuation and assessment did prior to Aug., 1893, assess the defendant's franchise for the tax year 1893 at $109,246.31; and that said board did for the tax year 1894 assess the defendant's franchise at $112,278.91.

T. L. EDELEN, *Sp. Judge.*

56 *Statement of County Clerk.*

Franklin Circuit Court.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Plaintiff,
vs.
DEPOSIT BANK OF FRANKFORT, Defendant.

Statement of N. B. Smith, county court clerk.

I, N. B. Smith, clerk of the county court for Franklin county, state that on or about the — day of August, 1893, I received through the mail a paper, of which the paper in Exhibit "B" in this cause addressed "County clerk, Franklin county," with the name "L. C. Norman, auditor," attached, leaving off my certificate on the Exhibit "B," is a true copy, and the printing thereon shows how much and what parts of the paper received by me are in print which includes the name "L. C. Norman, auditor," and how much and what parts

of said paper are in writing. And that on July 6, 1894, I received through the mail a paper of which the paper in Exhibit "A" in this cause addressed "County clerk Franklin county" with the name "L. C. Norman, auditor," attached, leaving off my certificate on the Exhibit "A" is a true copy, and the printing thereon shows how much and what parts of the paper received by me are in print, which includes the name "L. C. Norman, auditor," and how much and what parts of said paper are in writing.

N. B. SMITH,
Clerk Franklin County Court.

57 EXHIBIT "A."

Assessment of Corporation Franchises for 1894.

(Please return enclosed receipt to this office.)

Office auditor of public accounts.

FRANKFORT, KY., *July 6th*, 1894.

County clerk, Franklin county.

DEAR SIR: The State board of valuation and assessment have made the following assessment of franchises in the above county for 1894.

Please file this statement in your office, and furnish copies to the various collectors of taxes.

Farmers' Bank of Kentucky	$503,400.00
State national bank	180,126.07
Frankfort Safety Vault & Trust Co	19,764.27
Deposit bank, Frankfort	112,278.91
Bank of Kentucky	190,000.00

Yours truly, L. C. NORMAN, *Auditor.*

STATE OF KENTUCKY:

FRANKLIN COUNTY, *July 6th*, 1894.

To the tax collector for the city of Frankfort:

The above is a true statement of the assessment of the franchises of the corporation named by the State board of valuation and assessment for 1894, as reported to me by L. C. Norman, auditor, liable to taxation for purposes of the city of Frankfort for the year 1894. The same has been filed by me in my office, and is now certified to you for collection of the city taxes thereon.

Given under my hand and seal this July 6th, 1894.

N. B. SMITH,
Clerk Franklin County Ct.

58 FRANKFORT, KY., *July 6th*, 1894.

The amount of taxes due the city of Frankfort from each of said corporations, upon the foregoing assessments for the year 1894, is as follows:

Farmers' bank	$7,047.60
10 % penalty	704.76
Total	$7,752.36
State national bank	$2,520.00
10 % penalty	252.00
Total	$2,772.00
Frankfort Safety Vault & Trust Co	$276.69
10 % penalty	27.66
Total	$304.35
Deposit bank	$1,571.90
10 % penalty	157.19
Total	$1,729.09
Bank of Kentucky	$2,660.00
10 % penalty	266.00
Total	$2,926.00

Total tax and penalty of said corporation for the year 1894, $15,483.80.

This amount bears interest at the rate of 10 % per annum from July 1st, '94, until paid.

HUGH RODMAN, *City Att'y.*
W. H. JULIAN.

(Endorsed:) No property found from which to make the foregoing taxes of the State national bank, Deposit Bank of Frankfort national bank. Aug. 22, 1894. James M. Hallnan, tax collector for the city of Frankfort.

59 EXHIBIT "B."

Assessment of Bank Franchises for 1893.

(Please return enclosed receipt to this office.)

Office of auditor public accounts.

FRANKFORT, KY., *Aug.* 1893.

County clerk, Franklin county.

DEAR SIR: The State board of valuation and assessment have made the following assessment of franchises in the above county for 1893.

Please file this statement in your office, and furnish copies to the various collectors of taxes.

Farmers' Bank of Kentucky	$495,919.27
Bank of Kentucky	195,000.00
State national bank	178,700.00
Deposit bank, Frankfort	109,246.31
Frankfort national bank	106,043.39

Yours truly, L. C. NORMAN, *Auditor.*

STATE OF KENTUCKY:

FRANKLIN COUNTY, *July 6th*, 1894.

To the tax collector of the city of Frankfort:

The above is a true statement of the assessment of the franchises of the corporations named by the board of valuation and assessment, for 1893, as reported to me by L. C. Norman, auditor, liable to taxation for purposes of the city of Frankfort for the year 1893. The same has been filed by me in my office and is now certified to you for collection of the city taxes thereon. Given under my hand and seal this July 6th, 1894.

N. B. SMITH,
Clerk Franklin County Court.

60 FRANKFORT, KY., *July 2nd*, 1894.

The amount of taxes due the city of Frankfort from each of said banks, upon the foregoing assessment for the year 1893, is as follows:

Farmers' Bank of Ky	$6,446.95
10 % penalty	644.69
Total	$7,091.64
Bank of Kentucky	$2,535.00
10 % penalty	253.50
Total	$2,788.50
State national bank	$2,323.10
10 % penalty	232.31
Total	$2,555.41
Deposit bank	$1,421.20
10 % penalty	142.12
Total	$1,563.32
Frankfort national bank	$1,378.56
10 % penalty	137.85
Total	$1,516.41

The city levy for 1893 being $1.30 per $100.

HUGH RODMAN, *City Att'y.*

The foregoing amounts of taxes bear interest at the rate of 10 % per annum from Sept. 1st, '93, until paid, in addition to the said 10 % penalty.

(Endorsement:) No property found from which to make the foregoing taxes of the State national bank, Deposit bank, or Frankfort national bank. Aug. 23, 1894. James M. Hallnan, tax collector for the city of Frankfort.

61 *Judgment.*

Franklin Circuit Court, Feb. 2, 1901.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT
vs.
DEPOSIT BANK OF FRANKFORT. } Judgment.

This action is submitted for judgment upon the pleadings, exhibits and evidence. I find that the allegations of the petition that the tax bills against the defendant had been duly returned by the tax collector "No property found" is specially denied by the answer. Now, it is well settled, I take it, that in the absence of express statutory authority, no action will lie for the recovery of taxes, the ordinary power of distraint being deemed amply sufficient for that purpose. Thompson *v.* Allen County, 115 U. S., 550; Baldwin *v.* Hewitt, auditor, 88 Ky., 673; McLean County Precinct *v.* The Bank, 81 Ky., 254; Jones *v.* Gibson, 82 Ky., 561; Grand Rapids School Furniture Co. *v.* Trustees, &c., 44 S. W. R., 99; S. C. 19 Ky. L. R., 1601.

Express statutory authority is invoked by the plaintiff as contained in section 3424 of the Kentucky Statutes. An examination of that section will show that it shall be lawful for a city to institute proceedings after the tax collector shall make his return of "No property found" as to any unpaid taxes. The return is a condition precedent to a right of action and so plaintiff con-
62 strued it in instituting his action because it is alleged in the petition that his return of "No property found" was duly made by the tax collector. It becomes material to inquire then when and how this return shall be made by the tax collector. I think the inquiry is answered by sections 3421 and 3422 of the Statutes. By the former of these sections it is provided that the collector shall return to the office of the clerk of the council the collector's tax book at "the end of his official term," &c., and by section 3422 it is provided the collector, in all cases in which he shall be unable to find property while he has tax books or tax receipts in his hands upon which to levy and make the taxes, or any part thereof, to return the fact at the end of his official term, and if such return of "No property found" be true then as to such uncollected taxes the collector, in his settlement with the council, shall receive a credit for the amount by delinquent tax-payers. These sections, 3421, 3422 and 3424, are *in pari materia*. Taken together, it seems to me, they

establish the proposition that the tax collector cannot make a return, which constitutes a condition precedent to the plaintiff's right of action, until the end of his official term. Then the return must be made to the clerk of the council and by him preserved among the records of his office. It is elsewhere provided in the charter of cities of the third class that the tax collector while these tax receipts are alive in his hands and where he is unable to make a distraint for the collection of taxes may institute himself a proceeding in the county court and have garnishees summoned and a disclosure made.

63 This is provided by section 3390 of the Statutes, in which it is said that he, the collector, "shall have like power given by law to sheriffs for the collection of taxes by garnishment."

The only evidence I find in the record tending to establish the truth of the allegation that these tax bills had been returned "No property found" is exhibits marked "A" and "B"—both signed by Hugh Rodman, city attorney, and W. H. Julian, one of the counsel for the plaintiff in this action, and each of them returned substantially "No property found" from which to make the foregoing taxes, &c., and signed by James M. Hallnan, tax collector for the city of Frankfort. There is nothing in the record to show that these returns were made to the office of the city clerk, but it does appear affimatively from the returns themselves that they were made before the expiration of the collector's term of office. I think, therefore, that there is a total failure of proof of any return of no property found to make the taxes sued on within the meaning of the statute.

A good deal was said in the argument in this case about this point having been waived by the failure to insist on it earlier. The allegation, however, was traversed in the original answer of the defendant and on the former hearing of this case the submission was set aside to permit the plaintiff to file the exhibits I have referred to for the purpose of establishing this litigated fact.

It follows from the views I have herein expressed, that the plaintiff has failed to establish a substantive averment of his peti-

64 tion which was traversed by the answer, and the petition must be dismissed with costs, and it is accordingly so ordered. Plaintiff excepts to the foregoing judgment, and prays an appeal to the court of appeals, which is granted.

T. L. EDELEN,
Special Judge.

A copy.
Attest: T. B. FORD, *C. F. C. C.*

Clerk's Certificate.

Franklin Circuit Court.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Pl'ff,
vs.
THE DEPOSIT BANK OF FRANKFORT, Def't.

I, Thos. B. Ford, clerk of the court aforesaid, do certify that the foregoing 25 pages contain a true and perfect copy of all the orders, pleadings and proceedings in the case mentioned therein, since the filing of the mandate of the court of appeals in said case, except the exhibit of the Federal court record, filed with the reply, and the opinion of the court of appeals and response to petition for rehearing filed in this court on Dec. 19, 1900.

Witness my hand, as clerk aforesaid, this the 19th day of March, 1901.

THOS. B. FORD, *Clerk.*

Fee $5.00.

65 With the foregoing transcript the appellant filed the following statement of parties:

Statement of Parties, &c.

Court of Appeals, Ky.

BOARD OF COUNCILMEN OF THE CITY OF Frankfort, Appellant,
vs.
DEPOSIT BANK OF FRANKFORT, Appellee.
Statement of Parties, &c.

The judgment in the above-styled cause, wherein The Board of Councilmen of the City of Frankfort is the sole appellant, & The Deposit Bank —fort is the sole appellee, was rendered by the Franklin circuit court on February 2nd, 1901, at the January term of said court, & will be found on page 22 of this record.

The appeal therefrom was granted by said circuit court, & no summons is necessary.

W. H. JULIAN,
Att'y for Appellant.

66 Afterwards at a court of appeals held in and for the Commonwealth of Kentucky on the 19th day of March, 1901, the following order was entered, to wit:

BOARD OF COUNCILMEN OF FRANKFORT
vs.
DEPOSIT BANK OF FRANKFORT.
Franklin.

Came the appellant by counsel and filed an affidavit and moved the court for an order directing the clerk of the lower court to trans-

mit to the clerk of this court all that part of the record herein including exhibits and papers filed since the 19th day of December, 1900, which motion is submitted.

Afterward at a court of appeals held as aforesaid on the 20th day of March, 1901, came appellant by counsel and withdrew motion for order directing clerk of the court below to send up original papers.

Afterwards at a court of appeals held as aforesaid on the 2nd day of May, 1901, the following order was entered herein to wit:

Came appellant by counsel and filed statement and moved the court for a *subpœna duces tecum* directing the clerk of the Franklin circuit court to transmit to the clerk of this court a certain exhibit filed in this case in said court being a printed transcript of the record in the case of Stone, auditor, etc., *vs.* Deposit Bank in the United States circuit court for district of Kentucky, which motion is submitted.

The following is the statement filed by the foregoing order:

67 *Motion and Grounds for Subpœna Duces Tecum.*

Court of Appeals of Kentucky.

BOARD OF COUNCILMEN OF THE CITY OF Frankfort, Appellant,
vs.
DEPOSIT BANK OF FRANKFORT, Appellee.
} Motion and Grounds for a *Subpœna Duces Tecum.*

Appellant Board of Councilmen comes and moves the court for a "*subpœna duces tecum*" directed to the clerk of the Franklin circuit court, causing him to transmit to the clerk of this court a certain exhibit filed in this case in the court below and made part of the record herein—same being a printed transcript of the record in the case of Stone, auditor, &c., *vs.* Deposit Bank of Frankfort, in the United — circuit court for the district of Kentucky, and made part of the appellant's reply herein.

The grounds of this motion are as follows: On the return of this cause to the circuit court on the former appeal herein, appellee filed a supplemental answer partially setting forth and relying upon the judgment of said Federal court in said case, as an estoppel against the further prosecution of this action.

The appellant filed a reply to said supplemental answer, alleging that the Federal court judgment in said case was based solely upon an unreversed judgment of the Franklin circuit court,
68 and besides that the same was in a litigation as to other years' taxes than those involved herein.

An examination of the record in said Federal court case is necessary to a proper understanding of the judgment therein. That record consists of 124 printed pages. The copying of said printed record would cause unnecessary cost and delay, and besides this

court could more readily and easily examine the said printed transcript than a copy thereof made by the clerk of the court below, the same being well indexed by the clerk of the United States Supreme Court.

A copy of said printed record would contain about ten times as many words as all the remainder of the transcript made by the clerk below on this appeal.

All said unnecessary cost and delay and inconvenience to the court can be avoided by the *subpœna duces tecum* now asked.

2 Civil Code sec 743, subsec. 2.

T. H. CROCKETT, *City Att'y.*
J. W. RODMAN,
IRA & W. H. JULIAN,
For Appellant.

Afterwards at a court of appeals held as aforesaid on the 7th day of May, 1901, the following order was entered herein:

The court being sufficiently advised, the motion herein for a *subpœna duces tecum* is overruled.

69 Afterwards at a court of appeals held as aforesaid on the 14th day of May 1901 the following order was entered herein to wit:

Order Advancing, Tendering Additional Record.

Came appellant by counsel and on motion this case is advanced for decision and appellant by counsel tendered an additional record and moved the court to file same, which motion is submitted.

Afterwards at a court of appeals held as aforesaid on the 16th day of May, 1901, the following order was entered herein:

The court being sufficiently advised, the motion to file additional transcript is sustained and said additional transcript is ordered to be filed.

The following is the additional transcript filed by the foregoing order:

Order Filing Additional Record.

70 Transcript of Record.

Circuit Court of the United States, Sixth Circuit and District of Kentucky.

DEPOSIT BANK OF FRANKFORT, Complainant,
vs.
S. H. STONE ET AL., Defendants. } No. 275.

Additional transcript.

Proceedings of the circuit court of the United States for the district of Kentucky at its regular term, begun and held at the Federal court hall, in the city of Frankfort, on Monday, June 13, 1898.

Present: Honorable John M. Harlan, circuit justice; Honorables W. H. Taft and H. H. Lurton, circuit judges.

No. 275. Bill of Complaint.

DEPOSIT BANK OF FRANKFORT, Complainant,
vs.
SAMUEL H. STONE ET AL., Defendants. } No. 275. Bill of Complaint.

Be it remembered that heretofore, to wit, on May 12, 1897, came the complainant, The Deposit Bank of Frankfort, by its counsel, Frank Chinn, and filed in the clerk's office of our said court its bill of complaint and exhibits against the above-named defendants, S. H. Stone *et al.*, which bill of complaint is in words and figures as follows, to wit:

To the judges of the circuit court of the United States for the sixth circuit and district of Kentucky:

The Deposit Bank of Frankfort brings this its bill of complaint against Samuel H. Stone, G. W. Long, Charles Finley,
71 County of Franklin and The Board of Councilmen of the City of Frankfort, and thereupon the complainant says: The complainant is a corporation duly created by and organized under the laws of the Commonwealth of Kentucky, and is a citizen of that State.

The defendant, Charles Finley, is the secretary of state of the State of Kentucky; the defendant, Samuel H. Stone, is the auditor of public accounts of the said State of Kentucky; and the defendant, George W. Long, is the treasurer of said State of Kentucky; the Board of Councilmen of the City of Frankfort is a municipal corporation created by and organized under the laws of the State of Kentucky, and the county of Franklin is also a corporation created by and organized under the laws of said State.

The complainant was created a body corporate and politic by an act of the General Assembly of the Commonwealth of Kentucky, entitled "An act to incorporate the Deposit Bank of Frankfort," approved March 3rd, 1863. By the said act the complainant was authorized to acquire, hold and use, such estate, goods and chattels as should be convenient for the transaction of its business. Its place of business was to be in the city of Frankfort, and its business was to be loaning money, discounting, buying and selling promissory notes and bills, and dealing in exchange, and the general powers of a banking corporation were conferred upon it.

The said corporation was duly organized under its said charter on the — day of ——, 1867, and its corporate existence has been continued ever since, and it has coutinuously since then performed all the duties required of it by the said act of incorporation, and
72 the several amendments thereof, and the laws of the land.

By the terms of the said act of incoporation the complainant was authorized to transact the business of a bank under the terms of said charter for the period of twenty years from March 3, 1863,

By the general laws in force in the State of Kentucky in the year 1863, and continuously thereafter until the 8th day of March, 1871, the banks doing business in the State were required to pay to the State of Kentucky fifty cents on each one hundred dollars' worth of the capital stock of each bank, and by an act of the General Assembly of the Commonwealth of Kentucky, entitled "An act to amend the charter of the Deposit Bank of Frankfort," approved March 8, 1871, it was provided "that the tax or bonus now (then) paid by said bank (meaning this complainant), in future, shall be in full of all taxation, but this shall not apply to city tax on real estate owned by it." The tax or bonus above referred to was the fifty cents on each one hundred dollars' worth of its capital stock required by the eneral law to be paid by all the banks in Kentucky.

By another act of the General Assembly of the State of Kentucky, approved February 23, 1882, and entitled "An act to extend the charter of the Deposit Bank of Frankfort," all the privileges and franchises granted to said bank under the said act of March, 1863, as amended by the act of March 8, 1871, were extended and continued in force for the period of twenty years from February 23, 1882. See Acts of 1881, vol. 1, page 495.

73 The complainant paid each year the tax required by its said charter to be paid, to wit, fifty cents on each hundred dollars of its capital stock, down to July 1, 1886, since which time it has paid seventy-five cents on each one hundred dollars' worth of said stock, as hereinafter fully set out.

The complainant says that by the settled course of the decisions of the court of appeals of the State of Kentucky, which is the highest court in said State, the meaning of the provisions in the complainant's charter has been fixed and determined. By a decision of the court rendered on June 5, 1888, the judgment of the Franklin court of common pleas was confirmed, by which judgment said court held that the Commonwealth could not tax the complainant at a

greater rate than fifty cents on each hundred dollars of the value of its stock, and that this included all taxation of all kinds, State, county, and city, except alone city tax on real estate owned by said bank. By an act of the said General Assembly of the Commonwealth of Kentucky entitled "An act to make taxation equal and uniform in counties where an *ad valorem* tax is levied by the court," approved March 18, 1876, it was made the duty of the chief officer of any bank doing business or owning property in the county to list with the assessor all the property owned by the bank, and it was provided that all property thus listed and assessed should be subject to an uniform and equal rate of taxation.

Under this act the county court of Franklin county, being the fiscal authority of the defendant, The County of Franklin, attempted to assess for county taxation the property and choses in action of the complainant situated in the county of Franklin. And there-
74 upon the plaintiff filed a bill in equity in the court of common pleas for said county against the said Franklin county, and prayed for an injunction against said county, enjoining and restraining it from endeavoring to collect any tax upon the basis of said assessment. In that suit the complainant set forth and claimed the exemption from other taxation than that provided by the aforesaid amendments to its charter, and claimed that the said act of 1876, so far as it attempted to repeal or impair the same, was void.

The said County of Franklin was duly brought before the said court and the cause was fully heard, and a judgment was rendered, exonerating the complainant from the payment of said tax, and enjoined the said County of Franklin from collecting and from endeavoring to collect or enforce the said assessment.

The complainant pleaded and relied upon the said exemption contained in its said charter, as amended, as a complete protection against the said tax sought to be collected from it, and both the common pleas court and the court of appeals upheld the said exemption, and adjudged that the complainant was not liable for said tax during its corporate existence.

The complainant here pleads and relies upon the said judgment of the said common pleas court, and of the said court of appeals, and files herewith, as part hereof, a copy of the record of the said suit in the said court of appeals, and marks the same Exhibit "A."

By another act of the General Assembly of the Commonwealth of Kentucky, approved May 7th, 1886, and entitled "An act to amend the revenue law of the Commonwealth of Kentucky," it was provided that the cashiers of all State and national
75 banks should annually, on the first day of July, each year, make a report of the condition of said banks to the auditor of public accounts, and should pay into the State treasury seventy-five cents on each one hundred dollars of the capital stock of said bank, and should, in addition, pay into said treasury, on their surplus, undivided profits, and undivided accumulations, in excess of ten per cent. of their capital stock, the same rate of taxation as was paid on real property. And it was provided by the said act that the said taxation should be in full of all tax, State, county, or municipal,

except that the real estate and buildings owned and used by the banks in conducting their business should not be exempt from taxation for municipal and county purposes, and that such real estate alone might be taxed for county and State purposes as other real estate was taxed. By the terms of said act the following condition was annexed, upon which any of the banks referred to therein were to become subject to such act:

SECTION 4. "That each of said banks, institutions and corporations by its proper corporate authority, and with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive or release all rights under acts of Congress or under the charters of the State banks to a different mode, or a smaller rate of taxation,
76 which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of each bank and delivered to the governor of this Commonwealth; and upon such agreement being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such bank."

The complainant avers that at a meeting of the stockholders of the complainant held on the — day of July, 1887, at which a quorum of the stockholders was present, and a majority of said stockholders, and a majority in interest thereof, did accept the provisions of said act and give their consent to the levying of seventy-five cents on each share of its capital stock, equal to one hundred dollars in value, and agreed to pay the same, together with the same tax as was assessed on real estate by the general law, upon so much of its surplus, undivided profits, etc., as exceeded an amount equal to ten per cent. of its capital stock, as in said act provided, and did further agree to waive and release all rights under its charter to a different mode or smaller rate of taxation. And the said consent of the complainant to the release and waiver aforesaid, together with the said agreement, was certified in writing under the seal of the complainant by its proper corporate authority to the governor of the Commonwealth of Kentucky, and delivered to him on the — day of July, 1887, before the next meeting of the General Assembly after the passage of said act.

The complainant avers that it has annually, since the above-recited act became a law, through its cashier, reported on oath
77 on the first day of July, each year, to the auditor of public accounts the true amount of its capital stock, surplus, undivided profits and undivided accumulations, and how such undivided profits and undivided accumulations were invested, and has annually in each year since the said act went into effect, up to and including, July, 1892, paid into the treasury of the Commonwealth of Kentucky the full amount of the taxes due from the complainant, as required by the terms of said act, the said amount being seventy-five cents on each one hundred dollars' worth of its capital stock, and a tax at the same rate as that assessed by the State upon real property upon its

surplus, undivided profits, and undivided accumulations in excess of ten per cent. of its capital stock.

The complainant made these reports and payments up to July 1, 1893, when the said auditor of public accounts refused to receive the said tax under the aforesaid act (which is known as the Hewitt act), although the complainant tendered the same to the said auditor as required by the said act. The complainant paid the same about the first of July, 1895, and first of July, 1896, and in the spring of 1896, at the request of the auditor, and after the judgments hereinafter set out had been rendered in complainant's favor, paid to the auditor the difference between the amounts paid on July 1, 1893, and July 1, 1894, and the amount which it tendered at those times, which was the amount due under the Hewitt law. And the complainant avers that it has, ever since the said Hewitt act became a law down to and including 1896, paid the full tax called for and required by the said Hewitt law.

78 By the 3d article of an act passed by the General Assembly of the Commonwealth of Kentucky, in 1892, in relation to the assessment of the banks and other corporations, it is provided in substance that every incorporated bank, in addition to other tax imposed upon it by law, shall pay a tax upon its franchise to the State, and a local tax thereon to the county, incorporated city, town or taxing district where its franchise may be exercised. By the terms of said act the auditor, treasurer and secretary of state constitute the board of valuation and assessment for fixing the value of the said franchises. It is provided that in order to determine the value of the franchise, the banks shall each fully report on or before the first day of March in each year, which reports shall be made up to include the 31st day of the preceding December. These reports are to be verified by the chief officer of the bank, and are required to show these facts: The name and principal place of business of the bank; the amount of its capital stock; number of shares; amount of stock paid up, with nominal and real value thereof; highest price at which said stock was sold at a *bona fide* sale within twelve months next before the 15th day of September of the year in which the said statement was required to be made; the amount of surplus funds and undivided profits, and the value of all other assets; total amount of indebtedness as principal; amount of gross or net earnings or income including interest on investments, and income from all other sources for twelve months next preceding the 31st day of December of the year in which the statement is required to be made;

79 the amount and kind of tangible property in the State, and where situated, assessed or liable to assessment in the State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale, and any other facts which the auditor may require.

With this information and such other information as the board can obtain, it is authorized to direct and fix the value of the capital stock of the bank, and from the amount thus fixed to deduct the assessed value of all tangible property assessed in the State or in the counties where situated, and the remainder thus found is to be

the value of the corporate franchise subject to taxation under said act.

It is further provided that the said board shall apportion the value of said franchise upon the several taxing jurisdictions entitled to a share of said tax.

It is further provided that the auditor of the State, at the expiration of thirty days after the final determination of said values, shall certify to the county clerk of the counties where any portion of the corporate franchises of the banks shall be liable for local taxation, the amount thereof for county or State taxes, and such certificate is by the county clerk to be filed in his office, and by him certified to the collecting officer of the county and State for collection.

It is further provided that the taxes assessed by the State board of valuation and assessment shall be due and payable on the first day of July succeeding such report.

The said act also provides that in event the banks fail to
80 make such report and pay such tax, a penalty of ten per cent. shall attach upon the tax, and thereafter such tax shall bear interest at the rate of 10 per cent. per annum, and any bank or trust company failing to pay its taxes, penalty or interest, after becoming delinquent, is to — deemed guilty of a misdemeanor, and, upon a conviction, is to be fined for each day it remains unpaid, to be recovered by indictment or civil action in the Franklin circuit court, which has jurisdiction.

The complainant avers that the amount of its capital stock on the 31st of December, 1893, the 31st day of December, 1894, and on the 31st day of December, 1895, and on the 31st day of December, 1896, was $77,400.00; and its surplus on December 31, 1894, $38,010.44; December 31, 1895, $41,200.00; and December 31, 1896, $42,200.00, and that the amount of the value of its capital stock, as fixed by the board of valuation and assessment as of December 31, 1893, was $116,015.80; and this would be the valuation as of December 31, 1894; December 31, 1895; and December 31, 1896; that the tax rate for the county of Franklin for the year 1894 was 56⅔ cents; for the year 1895, 56⅔ cents; for the year 1896, 55 cents on the hundred dollars. The rate of tax for the year 1897 has not been fixed, but will be about 55 cents. The city tax of Frankfort was $1.45 for 1895 and 1896, and the rate for 1897 has not yet been established, but will be about the same.

Complainant therefore avers that the amount of tax which it would be required to pay under the board of valuation and assess-
ment law would be much greater than it would be compelled
81 to pay under the aforesaid Hewitt law. And the matter in dispute in this case exceeds $2,000.00, exclusive of interest and cost.

The complainant alleges that the aforesaid scheme of taxation violates the contract made between it and the State of Kentucky, in its aforesaid charter as amended, and violates the contract between it *add* the said State under the said Hewitt law, and is very largely in excess of the taxation provided for by its charter or by the said Hewitt law, and the act of the legislature of Kentucky, instituting

such a method of taxation violates the Constitution of the United States, and particularly the clause thereof which prohibits any State from passing any law which impairs the obligation of contracts, and is void.

The aforesaid method of taxation also violates the constitution of the State of Kentucky, in that by said constitution of the State of Kentucky it is expressly provided that the General Assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but may, by general laws, confer upon the proper authorities thereof, respectively, the power to assess and collect such taxes; and in this, that the said law provided for an assessment of the capital stock of corporations, banks amongst the others, by a State board of valuation and assessment, and provides for the certification of such value by the said State board to counties and municipalities where any such capital stock is situated or franchises employed; giving to said State board the right to apportion
82 same among the taxing districts, and provided that said corporation shall pay to the local taxing districts local taxes thereon.

The said law having been thus passed in 1892, the State board of valuation and assessment valued the capital stock of the complainant and certified to the authorities of the defendant-, The County of Franklin, and The Board of Councilmen of the city of Frankfort, the said value for taxation by the said county and city for the year 1893. The County of Franklin caused to be placed in the hands of R. D. Armstrong, sheriff of said county, and the collector of its revenue, the tax bill made out accordingly, and the Board of Councilmen of the City of Frankfort caused to be made out a tax bill upon such valuation for the collection of its tax thereon.

The complainant filed in the circuit court of Franklin county, that being a court of general jurisdiction, its petition against the County Court of Franklin county and R. D. Armstrong, sheriff of said county, on the 22nd day of December, 1893, alleging in its petition in apt terms the contract between it and the State in regard to taxation under its charter as amended, and under the aforesaid Hewitt law, and claimed the benefit of such contracts, and claimed that no tax could be collected from the complainant, except in pursuance of the said Hewitt law, during its corporate existence, and claimed further that the act of the legislature of November 11th, 1892, was unconstitutional and void, as impairing the obligation of this contract, and prayed the court to establish these contracts, and to enjoin the said county and the sheriff from attempting to collect any tax contrary thereto.

83 Issue was joined upon complainant's said suit, and the judgment was rendered in said circuit court, upholding the said act of November 11th, 1892, and adjudged the complainant liable for the said tax, which judgment was entered accordingly.

Thereupon the complainant appealed from the said judgment to the court of appeals of Kentucky. Its appeal having been heard fully in that court, it was adjudged that the judgment of the lower court was erroneous, and the said case was remanded to the said

circuit court for judgment in conformity to the opinion of said court of appeals.

Thereupon the said Franklin circuit court entered the following judgment on February 1st, 1896, which has ever since, and does now, remain in full force and effect, to wit:

"Franklin Circuit Court, Feb. 1st, 1896.

"DEPOSIT BANK OF FRANKFORT, Plaintiff,
vs.
FRANKLIN COUNTY, &c., Defendant. } Judgment.

"The plaintiff having heretofore filed a notice accepted by the defendant's attorney, together with the mandate and opinion of the court of appeals in this action, and the defendants, by their attorneys, waiving the filing of said mandate in the clerk's office as required by law, and consenting to the submission of this case for judgment at this time, it is now ordered and adjudged in accordance with the
84 mandate and opinion of said court in this action, that art. 2 of the act of the General Assembly entitled 'An act to amend the revenue laws of the Commonwealth of Kentucky,' May 17th, 1886, (General Statutes, chap. 92, art. 2), and the acceptance of the provisions thereof by the plaintiff constituted a contract between the plaintiff and the Commonwealth, which the latter cannot alter or change without the consent of the former; by the terms of which contract the plaintiff cannot, during the continuance of its charter, be assessed for taxation, or taxed for State purposes in a different mode or at a greater rate of taxation than as provided for in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon any real estate it may own; that the provisions of the present constitution of this State and of the act of November 11th, 1892 (art. 3, chap. 103, Acts 1891-'2-'3), in so far as they were intended to provide for any assessment or taxation of the plaintiff's property, rights of property or franchise except its said real estate, are in violation of, and repugnant to the Federal Constitution, and void; that the board of valuation and assessment provided for in said act of November 11th, 1892, had and has no authority in law to assess or value the plaintiff's franchise for taxation, or the auditor to apportion or certify the same or any part of the same, for county and municipal taxation; that the temporary injunction which was granted in this cause at the commencement of the action be and the same
85 is now hereby made perpetual, and the defendants be and each of them *are* perpetually enjoined and restrained from levying upon or selling any property of the plaintiff for the purpose of collecting any taxes for the county of Franklin upon the franchise of property of the plaintiff except upon its real estate. And it is further adjudged that the plaintiff recover of the defendant its cost in this action expended, to all — which the county of Franklin excepts, and prays an appeal to the court of appeals, which is granted."

A duly certified copy of the record in said cause as it appeared in the court of appeals is filed herewith as a part hereof marked

Exhibit "B," and the complainant states that the said exhibit contains the whole record in the said case, except the decree made by the said Franklin circuit court on January 21st, 1896, the terms of which have been stated above, and a duly certified copy of which is filed herewith as part hereof, marked Exhibit "C."

The defendant Board of Councilmen of the City of Frankfort, filed its petition in the said circuit court, which is a court of general jurisdiction, on August 22, 1894, against this complainant, alleging that complainant was indebted to the city in the sum of $4,243.10 taxes and $299.31 penalty and interest for the years 1892, 1893 and 1894, upon its notes, money, choses in action, and other property of the value of one hundred thousand dollars for 1892, and upon the franchise as valued by the said board of assessment, 1893, $109,246.31, and upon said franchise for 1894 valued by said board at $112,278.91.

The rate of taxation in said city being $1.25 in 1892, $1.30
86 in 1893 and $1.40 in 1894, the said assessments being made by the collector of the city for 1892, and by the said board of assessment pursuant to art. 3 of the said act of November 11, 1892.

Process having been served upon this complainant upon this suit the complainant filed its answer in said suit September 27, 1894, in which answer it set forth its contract under its charter as amended, and under the said Hewittt law with the State, and relied upon the same, and set forth the attempted violation of said contracts, and prayed judgment that the said contracts between the complainant and the State be sustained and declared valid by the court, and that the said State be restrained from assessing or attempting to assess, or from collecting or attempting to collect from the complainant any tax upon its property or franchise, except upon real estate which complainant might thereafter acquire, the complainant then being the owner of no real estate whatever.

Issue was joined in said suit by said answer, and it was agreed between the counsel for this complainant and the counsel for the Board of Councilmen of the City of Frankfort, that the said cause should stand upon the answer filed by the complainant until the decision by the court of appeals in the two cases appealed to said court from the said circuit court, in one of which the complainant was plaintiff, and The County of Franklin and others were defendants, and in the other The Commonwealth for the use of said county was the plaintiff, and this complainant was the defendant. In both --
87 which cases the same contract hereinbefore set out between the State and this complainant was alleged and relied upon, and the liability of the complainant for the tax claimed in said case, should be settled and determined by the decision of the court of appeals in the said two cases. And after the said two cases in the court of appeals had been decided by that court, and the validity of the contracts with this complainant upheld by the said judgment, the said Franklin county circuit court, entered on February 1st, 1896, the following judgment:

"Franklin Circuit Court.

"BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Plaintiff,
vs.
DEPOSIT BANK OF FRANKFORT, Defendant. } Judgment.

"It appearing to the court that this action has been continued and not heretofore submitted, by agreement between the plaintiff and defendant by their respective attorneys, that this action should stand upon the answer filed by the defendant, until the decision by the court of appeals in the two cases appealed from this court, in one of which the defendant bank was plaintiff and The County of Franklin, &c., were defendants, and in the other The Commonwealth for the use of said county, was plaintiff and the defendant bank was defendant, and the liability of the bank for the taxes claimed
88 in this case should be settled and determined by the decision of the court of appeals in said two cases, the defense relied on in this case being the same contract set up and relied upon by the bank in those two cases; and it further appearing to the court by the mandates and opinions of the court of appeals filed in said two cases, that the court of appeals has sustained the defense set up and relied on by the bank in said two cases based upon the contract made by the bank under the Hewitt bill, which is the same contract relied on as a defense in this case: It is now ordered and adjudged that art. 2 — of the General Assembly entitled 'An act to amend the revenue laws of the Commonwealth of Kentucky,' approved May 17th, 1886 (General Statutes, chap. 92, art. 2), and the acceptance of the provisions thereof by the defendant constituted a contract between the defendant and the Commonwealth which the latter cannot alter or change without the consent of the former; by the terms of which contract the defendant cannot, during the continuance of its charter, be assessed for taxation, or taxed for State purposes in a different mode or at a greater rate of taxation than as provided for in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon any real estate it may own; that the provisions of the present constitution of this State and of the act of November 11th, 1892 (art. 3, chap. 103, Acts 1891–'2–'3), in so far as they were intended to provide for an assessment or taxation of the defendant's property, rights of prop-
89 erty or franchise, except its said real estate, are in violation of and repugnant to the Federal Constitution, and void; that the board of valuation and assessment provided for in said act of Nov. 11th, 1892, had and has no authority in law to assess or value the defendant's franchise for taxation, or the auditor to apportion or certify the same for county or municipal taxation; that the temporary injunction which was prayed for in this cause at the commencement of the action be and the same is now hereby granted, and the defendants be, and each of them *are*, perpetually enjoined and restrained from levying upon or selling any property of the defendant for the purpose of collecting any taxes for the city of Frank-

fort upon the franchise or property of the defendant except upon its real estate. And it is further adjudged that the defendant recover of the plaintiff its cost in this action expended, to all of which the Board of Councilmen of the City of Frankfort except, and pray an appeal to the court of appeals, which is granted."

The said Board of Councilmen has never prosecuted the said appeal to the court of appeals, which was granted in the said judgment.

The complainant files herewith as part hereof a duly certified copy of the record and proceedings in the said case, and makes the same part hereof, marked Exhibit "D."

The plaintiff avers that it has been fully and finally adjudicated in proceedings between complainants and defendants The
90 County of Franklin and Board of Councilmen of the City of Frankfort that the complainant's contract aforesaid is valid and enforcible, and that the complainant cannot be subjected to any greater rate of taxation than that agreed to by it under the aforesaid Hewitt law.

The complainant has always been ready to pay, and has paid all the taxes due by it under the provisions of the Hewitt law, and is still ready and willing to pay all taxes that may be demanded of it under the said act.

The complainant says that the defendants, Samuel H. Stone, Charles Finley and George W. Long, are threatening, and unless restrained by this honorable court, will proceed to value the franchise of the complainant under the act of November 11, 1892, for the years 1894, 1895, 1896 and 1897, and certify such value to the county clerk of Franklin county, to be by him certified to the collecting officer of the board of councilmen of the city of Frankfort, and the collecting officer of the county of Franklin; that such assessments will be illegal, in violation of the complainant's contract hereinbefore set out and upheld by the courts, and in the causes hereinbefore stated between the complainant and the said defendants, and will be unlawful and in violation of complainant's contract, and would cast a cloud over complainant's franchise; will cause a multiplicity of suits to be brought against the complainant and damage it in a way that cannot be repaired or estimated at common law; and from these threatened wrongs the complainant has no remedy at common law, but its only remedy is in equity; and unless restrained by this honorable court the defendants. The
91 County of Franklin and Board of Councilmen of the City of Frankfort, will attempt to levy and collect taxes based upon the apportionment of valuation found by said board of valuation and assessment, and will subject the complainants to the costs and annoyance of many suits, and cast a cloud upon its franchise and property, an effort will be made to enforce penalties against this complainant, as hereinbefore stated.

The premises considered, the complainant prays that the said Samuel H. Stone, Charles Finley and George W. Long be perpetually enjoined and restrained from assessing the value of the complainant's capital stock under the said act of November 11, 1892,

for the years 1894, 1895, 1896 and 1897, or any other year, and that the said defendant, Samuel H. Stone, be enjoined from certifying any such valuation to the said county and board of councilmen, and that the said county and Board of Councilmen of the City of Frankfort be enjoined and restrained from endeavoring to collect any tax upon any such valuation; that the complainant's contract be fully established; that it be declared that upon conforming to its said contract as hereinbefore set up, by making the payments under the Hewitt law, no other or further tax shall be exacted from it under any form or by any authority.

May it please your honors to grant unto your complainant a writ of subpœna under proper authority to be issued against the said Samuel H. Stone, Charles Finley, George W. Long, the County of Franklin and Board of Councilmen of the City of Frankfort, com-
manding them, under suitable penalty therein fixed, and
92 upon a day therein fixed, to appear and answer to this bill; but not under oath (answer under oath being waived), and stand to and abide by all orders and decrees that the court may enter in the premises, and your orator will ever pray for this and all other proper relief.

FRANK CHINN,
Solicitor for Complainant.

STATE OF KENTUCKY,
County of Franklin, } *sct:*

Benjamin Milam says he is president of the complainant, Deposit Bank of Frankfort; that the facts stated in the foregoing bill, in so far as stated from his personal knowledge are true, and so far as stated from information he believes them to be true.

BENJAMIN C. MILAM.

Subscribed and sworn to before me this 12th day of May, 1897, by Benjamin Milam.

W. G. CHAPMAN, *Clerk*,
By CHAS. N. WIARD, *D. C.*

Exhibit "A," referred to in the foregoing bill of complaint, is in words and figures as follows, to wit:

EXHIBIT A.

Record from court of appeals of Ky. in case of Franklin County Court *et al. v.* Deposit Bank of Frankfort.

COMMONWEALTH OF KENTUCKY:

Pleas before the honorable the Kentucky court of appeals, at the capitol, in the city of Frankfort, on the 5th day of June, A. D. 1888.

93 Chief Justice W. S. Pryor, Joseph H. Lewis, W. W. Holt, and Caswell Bennett, sitting.

FRANKLIN COUNTY COURT and J. W. GAINES, Sheriff of Franklin County, Appellants,
vs.
DEPOSIT BANK OF FRANKFORT, Appellee.

Be it remembered that heretofore, to wit, on the 16th day of July, A. D. 1884, the appellants, by their counsel, filed in the clerk's office of the court of appeals, a transcript of record in words and figures following, to wit:

Transcript from Court of Common Pleas.

STATE OF KENTUCKY:

Proceedings before the Honorable C. S. French, judge of the court of common pleas for Franklin county, at the court-house, in the city of Frankfort, on the 17th day of May, 1884.

Be it remembered that on the 6th day of September, 1883, the following petition was filed in the clerk's office of the court aforesaid.

Petition in Equity.

Franklin Common Pleas Court.

DEPOSIT BANK OF FRANKFORT, Plaintiff,
vs.
FRANKLIN COUNTY and JNO. W. GAINES, Sheriff of Franklin County, Defendants. } Petition in Equity.

The plaintiff, Deposit Bank of Frankfort, says it is a corporation created by an act of the General Assembly of the Commonwealth of Kentucky, entitled "An act to incorporate the Deposit
94 Bank of Frankfort," approved March 3, 1863, and organized and constituted as such corporation under the corporate name

of Deposit Bank of Frankfort, and doing business in the city of Frankfort under the authority of said act and the several amendments thereto; by the terms of said act the plaintiff, The Deposit Bank of Frankfort, was authorized to transact the business of a bank for the period of twenty years from March 3, 1863, or from August 8, 1868, when said bank was duly constituted a body politic and corporate, in the name pointed out by said act of March 3, 1863.

It says that by an act entitled "An act to amend the charter of the Deposit Bank of Frankfort," approved March 18, 1871, it is provided that the tax or bonus now paid by said bank (meaning this plaintiff) in future shall be in full for all taxation; but this shall not apply to city tax on real estate owned by it.

It further said that by an act of said General Assembly approved February 23, 1882, entitled "To extend the charter of the Deposit Bank of Frankfort," all the privileges and franchises granted to said bank under the said act of March, 1863, as amended by act of March 18, 1871, were extended and continued in force for the period of twenty years from the 3d day of March, 1883.

Plaintiff alleges that it has not owned, nor has it had in its possession, either in its own right or as agent for any one else, any real estate or any other tangible property, which is or was assessible under the law in any kind or specie, for any purpose whatever, either State or county, for either of the years from 1876 to 1883, inclusive; and all its property except office furniture of the value of about $500, which it is compelled to use in the management of its business, consists and is made up of notes, bills, accounts, choses in action and evidences of debt, and that the aggregate amount of all these is fully equaled and covered by its indebtedness to its stockholders, depositors and other credidors, and that it owns no balance whatever subject to taxation under General Statutes, chap. 92, art. 1, sec. 5, and that this is true as to each of the years 1876 to 1883, inclusive.

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It says further, that by the general law in force at passage of its charter in 1863, and which law has ever been in force, it was required to, and has in fact paid to, the auditor of public accounts, on the first days of each of the years, from the year 1868 to the year 1883, inclusive, an amount equal to fifty cents on each hundred dollars of its capital stock, to wit, on $77,400.

It alleges that this payment to the auditor of fifty cents on each one hundred dollars of its stock was "the tax or bonus" referred to and meant by the act of March 18, 1871, which provides that "the tax on bonus now (then) paid by said banks shall in future be in full of all taxation, etc., etc."

Plaintiff further says that notwithstanding all the facts hereinbefore set out, the defendant, Franklin County, without authority of law, has proceeded, upon a report made on April 20, 1881, by the sheriff, E. O. Hawkins, to the county clerk of said county, that "the Deposit Bank of Frankfort has property in its possession in this county owned by itself or others, and had said property in its possession for the last five years, of the value of $77,400, upon which no taxes have during said years been paid this

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county, because the assessor omitted to list the same for taxation. Said property consists of the capital stock of said bank, and its fixtures and furniture," to summons this plaintiff on the 17th day of March, 1883, to appear before the county court of said county on the 2d day of April, 1883, and list all the property of said bank situated in said county for assessment and taxation for county purposes for the years 1876 to 1883, inclusive.

This plaintiff appeared in said court in obedience to said summons or rule, and filed its response and plea, in which it denies that said county court had power or jurisdiction to assess or list, or to direct or order any one else to assess or list, its property for purposes of county taxation, or for any other purposes; it denied that it owned or possessed in its own right, or as agent for any one else, any real estate or any other tangible property, assessable for any purpose, State or county, in kind or specie; it stated that all its property, except office furniture, consisted of notes, bills, accounts, choses in action, and evidences of debt, and that the total of these was fully covered by its indebtedness to its depositors, stockholders and other creditors; that it had paid said fifty cents on each one hundred dollars' worth of its capital stock, to wit, on $77,400.00 worth, for each of said years from 1876 to 1882, inclusive, to the auditor, and it pleaded said payment to the auditor of fifty cents on each one hundred dollars
97 of its capital stock, to wit: on $77,400.00, in full of, and as a protection against, all other taxation, as provided in the aforesaid act of March 18, 1871.

But said court held said response and answer to be insufficient, and without hearing any evidence whatever, made and entered the following order in said proceedings, to wit:

Franklin County Court.

FRANKLIN COUNTY, Plaintiff,
vs.
DEPOSIT BANK OF FRANKFORT, Defendant. } Order.

In the matter of the summons and rule awarded heretofore herein, it appearing from the sheriff's report made to the clerk of this county, that the Deposit Bank of Frankfort has failed and refused, after demand made, to list its property or any part thereof for taxation for county purposes for the year- 1877-'78-'79-'80-'81-'82-'83 and the assessor and sheriff being unable to ascertain the amount of or to list said property; it is now ordered and adjudged that the demurrer of the attorneys for Franklin county to the response of said bank herein be sustained and the bank still refusing to list, or show further cause why it shall not list, the clerk of this court is hereby ordered and directed to list and assess the property of said bank under the equalization law, viz: its notes, bonds, bills, money, choses in action and evidences of debt after deducting there-
98 from its indebtedness (except the amount of its so-called liability to its stockholders) and one hundred dollars additional. Said balance of property, as appears by its own statements and re-

sponse herein, amounted in the year 1877 to $77,300.00; in 1878 to $77,300.00; in 1879, $77,300.00; in 1880, $77,300.00; in 1881, $77,300.00; in 1882, $77,300.00.

The clerk will also list the office furniture and tangible property of said bank for each of said years at the valuation fixed upon the same by said bank in its response, viz: $500.00 for each and all of said years, 1877 to 1883, inclusive. All the foregoing property to be assessed and taxed according to the amoudt of the *ad valorem* county levy tax for each of said years, respectively, as appears by the records of this county. And the clerk will certify the foregoing lists to the sheriff of Franklin county for collection.

The clerk of said county court on the 23rd day of May, 1883, without any authority of law, assessed the property of this plaintiff for county purposes (professing) to make said assessment pursuant to judgment of the Franklin county court, heretofore rendered as follows, to wit:

Val. property,	1876,	$77,800;	20c. on	$100.....	$155.60
" "	1877,	77,800;	20c. on	100.....	155.60
" "	1878,	77,800;	20c. on	100.....	155.60
" "	1879,	77,800;	25c. on	100.....	194.60
" "	1880,	77,800;	40c. on	100.....	311.20
" "	1881,	77,800;	40c. on	100.....	311.20
" "	1882,	77,800;	40c. on	100.....	311.20
" "	1883,	77,800;	40c. on	100.....	311.20
					$1,906.10

99 And has certified to the defendant, J. W. Gaines, sheriff of Franklin county, said so-called list or assessment, amounting in all to $1,906.10, for collection. And said Gaines, sheriff, has levied on the property of this plaintiff, and unless prevented will sell same to satisfy said taxes. Copies of said report, summons, response, judgment and tax-lists are filed herewith as part thereof.

Plaintiff here avers that none of the aforesaid property is subject or liable to taxation for county purposes in Franklin county; that said county court had no jurisdiction whatever to make any assessment or list of plaintiff's property for taxation for county purposes, or to direct or to order any one else to assess or list it.

And plaintiff avers that the aforesaid pretended assessment was made up and consists of the capital stock of the plaintiff, and no other or different property whatever, and is an attempt to tax its capital stock, in violation of the acts of 1871 aforesaid, which declares that the tax then and now paid, as aforesaid, by plaintiff to the auditor, shall be in full of all taxation except city tax on real estate owned by plaintiff; and it further alleges that said county court had no right or authority to assess, levy or collect an *ad valorem* tax on the property of the plaintiff at the rate of twenty cents on the one hundred dollars' worth of property for each or either of the years 1876, 1877 and 1878, or at the rate of twenty-five cents on the one hundred dollars' worth of property for the year 1879, or at

the rate of forty cents on the one hundred dollars' worth of
100 property for either of the years 1880, 1881 or 1882, or at rate of forty-five cents on the one hundred dollars' worth of property for the year 1883 for county purposes.

Plaintiff alleges that it has no remedy at law for its protection against the wrongs hereinbefore set out and complained of; that it would sustain great and irreparable injury from a sale of its property levied on by said sheriff as hereinbefore stated; that no previous injunction herein has been asked of, applied for, or refused by the court or any circuit judge.

Wherefore it prays that the defendant, John W. Gaines, sheriff, be enjoined and restrained from enforcing the levy made by him on plaintiff's property, and from subjecting any property of plaintiff's to sale under said alleged tax-list or to satisfy any tax alleged or claimed to be due Franklin county or any property of this plaintiff, and that defendant, Franklin County, be enjoined and restrained from assessing or collecting and from attempting to collect or assess hereafter any tax whatever on plaintiff's property for county or other purposes. And it prays for costs and all other proper relief.

WM. LINDSAY,
FRANK CHINN,
For Plaintiffs.

W. J. Chinn says that he is president of the Deposit Bank of Frankfort, and that he believes the foregoing statements are true.

W. J. CHINN.

Sworn to before me by W. J. *Shinn* this 5th day of September, 1883.

W. FRANKLIN, *C. F. C. C.*

101 *Order for Injunction.*

Franklin Common Pleas Court.

DEPOSIT BANK OF FRANKFORT, Plaintiff,
vs.
JNO. W. GAINES, Sheriff Franklin County, and FRANKLIN County, Defendants. } Order.

This day came the parties *with* above-styled action by their attorneys, the plaintiffs applying for an injunction, and the defendants appearing by Ira Julian, their attorney, and waiving *of* the notice of the time and place of said application, and it appearing that the judge of this court and also the judge of the Franklin circuit court are absent from Franklin county, an injunction is granted and will be issued by the clerk of this court, agreeable to the prayers of the petition herein upon the execution by the plaintiff of a bond before the clerk of this court, with good security, to the effect that the plaintiff will pay to the defendant such damages as they may sus-

tain, not exceeeding double the amount enjoined, if it be finaly decided that the injunction ought not to have been given.

W. FRANKLIN,
C. F. C. P. Ct.

September 6, 1883.

FRANKFORT, KY., *April* 20, 1881.

To the county clerk of Franklin county:

I hereby report to you that the Deposit Bank of Frankfort has property in its possession in this county, owned by itself or others, and has — said property in its possession for the last five years
102 of the value of $77,400.00, upon which no taxes have, during said years, been paid *by* this county because the assessor omitted to list the same for taxation. Said property consists of the capital stock of the said bank, and its furniture and fixtures.

E. C. HAWKINS, *S. F. C.*

Summons.

Commonwealth of Kentucky to the sheriff of Franklin:

You are commanded to summons the Deposit Bank of Frankfort to appear before the Franklin county court on Monday,.April 2, 1883, and list (or show cause why it shall not list), all the property of said bank situated in Franklin county for assessment and taxation for county purposes for the years 1876, 1877, 1878, 1879, 1880, 1881, 1882, and 1883, as required by the laws of this State, and warn it that upon failure to answer or list said property, the same will be listed and twenty-five per centum added to the value thereof as a penalty for said failure and refusal, and its "chief officers or agents" will be proceeded against for contempt.

Witness our hand this 14th day of March, 1883.

JAMES G. CROCKETT, *Clerk,*
By W. D. GRAVES, *D. C.*

Return.

The following return was endorsed on the summons:

Executed on W. J. Chinn, president of the Deposit Bank of Frankfort, Kentucky, by delivering to him a copy of the within summons. March 17, 1873. J. W. Gaines, S. F. C., by G. B. Thompson, D. S.

103 *Response and Plea.*

Franklin County Court.

In the Matter of the Proceeding to Assess Property of Deposit Bank of Frankfort for County Taxation.

In response to the rule herein the Deposit Bank of Frankfort comes and denies that this court has power or jurisdiction to assess or list its property for the purpose of county taxation or for any other purpose.

It says, further, it neither owns nor possesses in *his* own right, or as agent for any one else, any real estate or any other taxable property assessable for any purpose, State or county, in kind or specie.

It says all its property, except a small amount of office furniture, worth not exceeding five hundred dollars, consists and is made up of notes, bills, accounts, choses in action and evidences of debt, and that the aggregate of the same is fully covered by its indebtedness to its stockholders, depositors, and other creditors, and that it holds and owns no balance whatever, under the provisions of sec. 5, art. —, chap. 92, of the General Statutes.

It says, further, that the general laws in force at the date of its charter, provided, that it shall pay each year to the auditor of public accounts an amount equal to 50 cents on each one hundred dollars of its capital stock, and that an act approved March 18th, 1871, entitled An act to amend the charter of the Deposit Bank of Frankfort, provides:

1st. That the tax or bonus paid by said bank in future shall be in full of all taxation, but this shall not apply to city tax upon real estate owned by it:

104 2nd. This act shall take effect from its passage.

And it says it has, each year since 1871, including each of the years named in the notice or rule on which this proceeding is based, reported and paid to the auditor 50 cents on each one hundred dollars' worth of its said capital stock, to wit: on $77,400.00 worth, and it pleads and relies on each exemption and said payments in bar of this proceeding.

It says further that the facts stated herein are true as to each of the years 1876, 1877, 1878, 1879, 1880, 1881, and 1882, and it asks that this response and plea shall be made to apply to each of said years.

Wherefore it prays to be dismissed, &c.

FRANK CHINN AND
W. LINDSAY,
For Defendants.

Rule to List Property for Taxation.

COMMONWEALTH, for FRANKLIN COUNTY, *vs.* DEPOSIT BANK OF FRANKFORT. } Rule to List Property for Taxation.

In the matter of the summons and rule heretofore awarded herein, it appearing from the sheriff's report made to the clerk of this court that the Deposit Bank of Frankfort has failed and refused, after demand made, to list its property or any part thereof for county purposes for the years 1877, 1878, 1879, 1880, 1881, 1882, and 1883, and the assessor and sheriff being unable to ascertain the amount of or to list said property, it is now ordered and adjudged that de-

105 murrer of the attorneys for Franklin county to the response of said bank herein be sustained, and it still refusing to list,

or show further cause why it should not list, the clerk of this court is hereby ordered and directed to list and assess the property of said bank under the equalization law, viz: its notes, bonds, bills, money, choses in action and evidences of debt, after deducting therefrom its indebtedness (except the amount of its so-called liability to its stockholders), and one hundred dollars additional. Said balance of property, as appears by its own statements and response herein, amounted in the year 1877 to $77,300; and in the year 1878 to $77,300; in 1879 to $77,300; in 1880 to $77,300; in 1881 to $77,300; in 1882 to $77,300. The clerk will also list the office furniture and tangible property of said bank for each of the years at the valuation fixed upon same by said bank in its response herein, viz: $500 for each and all of the said years from 1877 to 1882, inclusive. All the foregoing property to be assessed and taxed according to the amount of the *ad valorem* county levy tax for each of the said years, respectively, as appears from the records of this court. And the clerk will certify the foregoing lists to the sheriff of Franklin county for collection.

STATE OF KENTUCKY, }
County of Frankfort, } *sct:*

I, James G. Crockett, clerk of the county court for the county and State aforesaid, do certify that the foregoing five pages con-
106 tain true copies of the report of E. O. Hawkins, sheriff of Franklin county, to the clerk of the Franklin county court, stating that the capital stock, furniture and fixtures of the Deposit Bank of Frankfort (had not been listed by the assessor of Franklin county for taxation), and of the summons issued by said court and the sheriff's return thereon, and of the response of said bank to said summons, and the judgment of said court rendered thereon, all of which are on file in my office.

Given under my hand this July 18th, 1883.

JAS. G. CROCKETT, *Clerk,*
By W. D. GRAVES, *D. C.*

Injunction Bond.

Franklin Common Pleas Court.

DEPOSIT BANK OF FRANKFORT, Plaintiff, }
vs. } Injunction Bond.
JAMES W. GAINES, ETC., Defendants. }

We undertake that the plaintiff, The Deposit Bank of Frankfort, shall pay to the defendants, J. W. Gaines, sheriff of Franklin county, and Franklin County, the damages, not exceeding four thousand dollars, which they, or either of them, may sustain if it be finally decided that the injunction ought not to have been granted.

Witness our hands this 6th day of September, 1883.

DEPOSIT BANK OF KENTUCKY,
By W. J. CHINN, *President.*
W. J. CHINN.

107 *Summons.*

The Commonwealth of Kentucky to the sheriff of Franklin county, Greeting:

You are commanded to summon Franklin County and Jno. W. Gaines, sheriff of Franklin county, to answer on the first day of the next November term, a petition filed against them in Franklin common pleas court, by Deposit Bank of Frankfort, and warn them that upon their failure to answer, the petition will be taken for confessed, or they will be proceeded against for contempt; and you will make due return of this summons on the first day of the next November term of said court.

Witness, W. Franklin, clerk of said court, this 6th day of September, 1883.

W. FRANKLIN, *C. F. C. C.*,
By R. B. FRANKLIN, *D. C.*

Return.

Executed on J. W. Gaines, sheriff of Franklin county, and R. A. Thompson, judge of Franklin county court, by delivering to each of them a copy of the within summons.

September 6th, 1883.

W. L. COLLING, *S. F. C.*
JNO. L. TOBIN, *D. S.*

At a court held on the first day of December, 1883—

The defendants filed a demurrer to the plaintiff's petition and the cause was submitted upon said demurrer, and the court, not being advised took time.

108 *Demurrer.*

Franklin Common Pleas Court.

DEPOSIT BANK OF FRANKFORT, Plaintiff,
vs.
J. W. GAINES, &c., Defendants. } Demurrer.

Defendant, The Franklin County Court, comes and demurs to the plaintiff's petition herein because the same is insufficient in law.

IRA JULIAN,
For Defendant.

Judgment.

At a court held on the 7th of May, 1884—

The demurrer to the petition being heard, the court overruled the demurrer and defendants except, and defendants, by their attorney declining to answer, it is adjudged that the injunction in this

cause be perpetuated, and the defendants are perpetually enjoined and restrained from further proceeding to collect the taxes mentioned in this action, and that plaintiff recover of the defendants its costs herein expended, to all of which defendants except and pray an appeal to the court of appeals, which is granted.

Clerk's Certificate.

Franklin Court of Common Pleas.

I, W. Franklin, clerk of the court aforesaid, do hereby certify that the foregoing twenty-one pages and the above lines contain a full, true and complete transcript of the record and proceeding, had in the cause therein mentioned.

Witness my hand, this 11th day of June, 1884.

W. FRANKLIN, *C. F. C. C.*

Fees for record, $5.50.

109 Upon which transcript was endorsed the following statement:

Statement.

FRANKLIN COUNTY COURT and J. W. GAINES, Sheriff of Franklin County, Appellants,
vs.
THE DEPOSIT BANK OF FRANKFORT, Appellees. } Statement.

The judgment appealed from was rendered at the May term, 1884, of the Franklin common pleas court, and may be found on page 22 of this record. Appeal granted below, and no summons desired.

IRA JULIAN,
Attorney for Appellants.

Afterwards at a court of appeals begun and held for the Commonwealth of Kentucky at the capitol, in the city of Frankfort, on the 23d day of May, A. D. 1884, the following order was entered:

FRANKLIN COUNTY, &c.,
vs.
DEPOSIT BANK OF FRANKFORT. } Franklin. (3 Cases.)

Ordered that these cases be continued for oral argument.

Afterwards at a court of appeals held as aforesaid on the 23d day of February, 1896, the following order was entered:

Hearing and Submission.

FRANKLIN COUNTY COURT, &c.,
vs.
DEPOSIT BANK OF KENTUCKY. } Franklin. (3 Cases.)

These causes came on and were argued by D. W. Lindsay for appellee, W. H. Julian for appellant, and laid over for further argument.

110 Afterwards, at a court of appeals held as aforesaid on the 25th day of February, 1886, the following order was entered:
These causes were argued by Wm. Lindsay for the appellees, John Rodman, for appellant, and laid over.

Afterwards, at a court of appeals held as aforesaid, on the 2d day of March, 1886, the following order was entered:
These causes were argued by Ira Julian for appellant, and submitted.

Afterwards, at a court of appeals held as aforesaid, on the 5th day of June, 1888, the following order was entered:

Judgment.

FRANKLIN COUNTY COURT, Appellants,
vs.
DEPOSIT BANK OF FRANKFORT, Appelles. } Appeal from the Franklin Common Pleas Court.

The court being sufficiently advised, it seems to them there is no error in the judgment herein.
It is, therefore, considered that said judgment be affirmed, which is ordered to be certified to the said court.
It is further considered that appellee recover of appellant its costs herein.

At the same time, to wit: June 5, 1888, the court, through Judge Caswell Bennett, delivered the following opinion, to wit:

111 *Opinion.*

THE FRANKLIN COUNTY COURT, Appellant,
versus
BANK OF KENTUCKY, Appellee.

SAME, Appellant,
versus
FARMERS' BANK OF KENTUCKY, Appellee.

SAME, Appellant,
versus
THE DEPOSIT BANK OF FRANKFORT, Appellee.

THE CITY OF FRANKFORT, Appellant,
versus
THE BANK OF KENTUCKY, Appellee.

SAME, Appellant,
versus
THE FARMERS' BANK OF KENTUCKY, Appellee.

The Franklin County Court, appellant, having assessed for county taxation, all the corporate property in Franklin county of the appellees, including their notes, bonds, bills, money, and choses in action, the appellees brought their separate actions of injunction against the appellant for the purpose of enjoining the collection of said tax.

The City of Frankfort, appellant, having assessed the real estate of the appellees within the corporate limits of Frankfort for the purpose of taxation, the appellees brought separate actions of injunction against the appellant for the purpose of enjoining the collection of said tax.

112 The lower court having perpetuated the appellee's injunction in each action, the appellants have separately appealed to this court. It is agreed that the cases may be heard together. They will be noticed in the order in which they stand.

FRANKLIN COUNTY
vs.
THE BANK OF KENTUCKY.

The appellee, The Bank of Kentucky, was chartered in 1834 by an act of the legislature of this State. This incorporating act provides that the appellee shall have and keep its principal office of discount and deposit in the city of Louisville, and it shall be the appellee's duty to establish not less than four, nor more than six, branches, and one branch shall be located at the seat of government, "to aid in the management of the fiscal affairs of the State." The act authorizes the appellee to have "a capital stock of five million

dollars, divided into shares of one hundred dollars each;" that the amount of capital that "shall be employed at the principal bank, and at the several branches, shall be under the control of the president and directors of the principal bank;" that the appellee shall have "full power and authority to acquire, hold and enjoy such real estate as shall be convenient for the transaction of its business, or which may be received in the discharge of any debt, or purchased in satisfaction of any judgment or decree in favor of the bank, or in the purchase of any property on which the said bank may have a lien." The 15th section provides:

113 "That it shall be the duty of the cashier of the principal bank, on the first day of July, 1836, and on the first day of July in each succeeding year, during the continuance of this charter, to pay to the treasury of this Commonwealth twenty-five cents on each one hundred dollars of stock held and paid for in said bank, which shall be in full of all tax or bonus: *Provided*, that the legislature may increase or diminish the same, but at no time shall the tax exceed fifty cents on each one hundred dollars of stock paid for in said bank."

In 1857 the legislature fixed fifty cents as the sum that the appellee should pay into the treasury on each one hundred dollars of its capital stock, "which shall be in full of tax or bonus." By the act of 1834 the appellee's charter was to continue in force until the first day of October, 1864.

The legislature, by an act approved February 15, 1858, enacted that the chartered privileges and rights of the appellee should continue in force for twenty years from the first day of October, 1864. But said extension of the charter of said bank shall be subject to the following restrictions and provisions:

1. It shall be subject to all the limitations, conditions and duties imposed upon it by the act of incorporation.

3. After this act of extension takes effect the amount of circulation shall not be greater than the amount of capital actually paid in.

4. The appellee shall establish a branch at the town of Columbus, Ky., with a capital of $150,000.

114 5. The appellee shall, within a year from the 10th day of May, 1858, by a vote of a majority of its stockholders, determine whether it will accept the "proposed extension;" and if it determines to accept, it shall notify the governor of the Commonwealth of the acceptance by the certificate of its president and directors; and this act shall be in force from that date.

The sixth section provides that the appellee "shall pay annually to the commissioners of the sinking fund fifty cents upon each one hundred dollars of the contingent fund now held, or may hereafter accrue, to said bank over and above the amount now required to be retained by its charter."

By an act of the legislature, approved February 1, 1872, the appellee was authorized to purchase from the Commonwealth the stock which she owned in its bank. But the "bank shall annually, on the 1st day of January, pay into the treasury a tax of fifty cents on

each share of one hundred dollars of its increased capital stock, which shall be in full of all tax or bonus on such increased capital stock."

The fifth section provides: "That the charter of the Bank of Kentucky be, and the same is hereby, extended twenty-five years."

The appellant's first contention is, that the legislature had no constitutional power to exempt the appellee from the common burden of taxation except "in consideration of public services." It contends that the exemption of the appellee from all taxation, except fifty cents on each one hundred dollars of its capital stock, was not "in consideration of public services," and, therefore, void.

115 At the time the appellee was chartered, and for years afterwards, the Federal Government issued no paper currency. Banks and banking were the creatures of the respective States. It was the policy of this Commonwealth to charter banks, with authority to issue paper currency, based upon a gold and silver redemption upon the demand of the holder. The issue of these banks constituted, in the main, the circulating medium in the Commonwealth for individual, commercial and public uses. While the aggregation of capital for banking purposes was, on the part of the projectors, for the purpose of individual gain, yet, the Commonwealth accepted the overture as auspicious to the purpose of furnishing a currency as stable in the nature of things as it could be made, for the private, commercial and public benefit of her citizens, also to aid her in the management of her fiscal affairs, which not only consisted in the providing of means to meet the ordinary administration of State affairs, but sometimes extended, at least might extend, to the borrowing of money to meet any extraordinary or unforeseen emergency. Therefore, we should hesitate to decide, were it material to decide, the question, that the granting of the charter to the appellee, and the fixing of a specific tax of fifty cents on each share of its capital stock was not in consideration of public services. But the right of the State to grant the charter to the appellees and exempt it from the payment of all taxes, except fifty cents on each share of its capital stock, rests upon the power of the State to make, for a valuable consideration, a valid and irrevocable contract.

116 The State of Kentucky, in the management and control of her affairs, in her relation to the other States, in her relation to the Federal Government, except in so far as certain powers are delegated by the Constitution of the United States, to the Federal Government, or one denied to the States, is sovereign by right. It is, by virtue of her sovereignty, that she has the power to contract. No binding contract can be entered into except by virtue of sovereign power. It is by this power that the State makes contracts with individuals; that she borrows money and gives her obligation for its payment. To deny a State power to make binding contracts is a denial of its power as a sovereign. Possessing the sovereign power to contract, she exercises the right just as an individual exercises his. The individual, in exercising the right of contract, does not barter away his sovereignty; he, for a valuable consideration, simply exercises it; for a valuable consideration coming to him

from the other party to the contract he surrenders something and reserves something in its stead, which he deems as an equivalent. Whether the one or the other has in fact received an intrinsic equivalent for that with which he has parted is not the question. The fact that it is of more or less value, and deemed by him to be an equivalent, is all that is required to make the contract irrevocably binding. In thus contracting he does not surrender his sovereign power, he merely exercises it. Upon precisely the same principle the Commonwealth contracts.

If her contract is without any valuable consideration it is *an nudum pactum*, so is that of the citizen, but if there is a valu-
117 able consideration to support it, she is bound by it, not upon the idea that she has surrendered or bartered away her sovereignty, but that she has exercised it in accordance with what she deems to be for the best interest of her citizens. The State possessing the power to make, for a valuable consideration, a binding contract, she falls within that provision of the Federal Constitution which declares that she shall pass no law impairing its obligation. In respect to her contracts she stands upon precisely the same footing that she does in reference to the contracts made between individuals—she shall pass no law impairing their obligation. In accordance with the foregoing views the Supreme Court of the United States, every since the Dartmouth College case, 4 Wheaton, 518, have consistently held that the creation of a corporation, especially banks, by the legislature of a State, whereby it was agreed that the corporation, in consideration of paying to the State a specific tax or bonus, was to be released from the payment of all other taxes, constituted a binding contract from which the State could not recede without the consent of the corporation; unless the State, in making the contract, expressly reserved the power to alter or amend it; or unless there was a general law in force at the time of making the contract which authorized the State, by subsequent legislation, to alter or amend it, and that there was nothing appearing in the legislative act of the contracting parties showing that the general law should not govern it. State Bank of Ohio *v.* Knoop, 16 Howard, 399; New Jersey *v.* Yard, 95 U. S., 104; Farrington *v.* Tennessee, 95 U. S., 679. This doctrine is so firmly rooted by the decisions of the Supreme Court of the United States, and so uniformly recog-
118 nized by the courts of last resort of all the States, that a decision by us, holding the contrary, would be regarded as eminently sporadic.

Does the provision in appellee's charter and amendments, declaring that the payment of fifty cents on each one hundred dollars of its capital stock "shall be in full of all tax or bonus," exempt the appellee from the payment of county or city taxes? The appellant contends that it does not.

It may be regarded as settled by the current of authority, and for the purpose of this investigation we will concede that it is so settled, that the appellee's capital stock and the shares of its stock are distinct things. That the capital stock is the money authorized to be paid in, and actually paid in, as the basis of the business of the bank

and the means of conducting its operations. The bank cannot increase or diminish this capital stock without express authority to do so; for the reason that it constitutes a trust fund which is held by the appellee as trustee, first, for the purpose of meeting and making good its liabilities; second, after discharging its obligations for the benefit of its stockholders. The shares of the capital stock are represented by certificates. Each holder is a beneficiary to the extent of his ownership. But he cannot control or withdraw a dollar of the principal; that must remain as the basis of the appellee's business operations. The shareholder is entitled only to share in the profits. So, the capital stock and the shares of the capital stock are distinct things, and both may be taxed. So, also,
119 the franchise—the right of the bank to exercise its powers in the prosecution of its business as a distinct right from its capital stock—may be taxed. So, also, its surplus earnings, being distinct from its capital stock, may be taxed. So, also, its real estate, if it does not represent its capital stock, but only its earnings, which are not a part of its capital stock, may be taxed. Angell & Ames on Corporations, sections 556, 557; Bradley *v.* The People, 4 Wall., 459; National Bank *v.* Commonwealth, 9 Wall., 353.

If, then the State granted to the appellee its charter, she had been silent as to her right to tax it, she would have the absolute right to tax it, under the foregoing heads, without being amenable to the objection of being guilty of imposing double taxation. Nor could it be successfully maintained that the appellee would not be liable to be taxed by the appellant, The County Court, under the act of the 17th of March, 1876, and by the appellant, The City of Frankfort, under its charter. But the State did not choose to be silent. It did speak. It said, that in consideration of the appellees paying into the treasury fifty cents on each $100 of its capital stock paid in without reference to its real value, such payment should be "in full of all tax or bonus." To say that this language has reference to the capital stock of the appellee, and not to the shares of its stockholders, or *vice versa*, or that it has no reference to the real estate of the appellee, acquired or used in its legitimate business, would be to torture the meaning of the language. The State agrees that, in consideration of receiving fifty cents on each $100 of the appellee's capital stock paid in, the same shall be in full of all
120 tax or bonus. It is conceded that this language binds the State to make no other assessment; and well may the concession be made, because, regarding the fifty cents in the light of a payment on the stock as capital stock proper or as the stockholders' shares, yet the contract says that the payment "shall be in full of all tax or bonus." Also regarding the appellee's real estate as a separate subject of taxation (and so is the capital stock and shares), yet the contract says that the payment of the fifty cents shall be in full of all taxation. If any part of appellee's property, its franchise, its capital stock, or the shares of its capital stock, or its real property, used in the operation of its business, is to be taxed in addition to the fifty cents, then it cannot be truthfully said that the payment of the fifty cents is "in full of all tax or bonus."

As before said, it is conceded that the terms of the contract bar the State from imposing any additional taxation; but it is contended that its terms do not bar the county and city from levying and collecting taxes for county and city purposes. In this position counsel clearly overlook the fact that the county and city are integrant parts of the State, and that they cannot levy and collect taxes without the authority of the State conferring that right upon them; so, the absurdity is presented, that the State contracts with the appellee, in consideration of its paying fifty cents on each one hundred dollars of its capital stock, to release it of "all tax or bonus"—this is the meaning of the language—and at the same time authorizes its local subdivisions to levy and collect other taxes off of the appellee. That is to say, that the State, by its con-
121 tract with the appellee, deprives itself of the right to levy and collect other taxes off the appellee, but may, notwithstanding, authorize all of its subdivisions, if the appellee's property and business were distributed in all of them, to levy and collect other or additional taxes off of it. It seems that it would occur to one, at first blush, that such a procedure would be a palpable violation of the contract. "Under such a contract between individuals a doubt could not exist." The State, when she makes a contract, based upon a valuable consideration, stands upon precisely the same footing.

In the Bank of Cape Fear *v.* Edwards, 5 Ired., 516, where the charter provides that the bank should pay annually into the treasury of the State twenty-five cents on each share of its stock owned by individuals, and that the bank should not be liable to any further tax, it was held that the bank was liable to no other tax, State or county. See also Farrington *v.* Tennessee, 95 U. S., 679, and New Jersey *v.* Yard, 95 U. S., 104, and the authorities there cited. Also in the case of The Farmers' Bank (one of the present appellees) *v.* Commonwealth and Greenup County, 6 Bush, 127, where the bank's charter provided that the annual payment into the State treasury of fifty cents on each one hundred dollars of the bank's capital stock "shall be in full of all tax or bonus," it was held that said provision exempted the bank from the payment of all other tax, whether State or county, including the bank's real estate, purchased for debt.

The appellant's next contention is that, if the appellee's
122 charter exempted it from all taxation except that herein provided for, the same expired on the first day of October, 1864, and that the act of the 15th of February, 1858, extending the charter for twenty years, created a new corporation, which the legislature, under the act of February 14, 1856, reserved the right to amend at pleasure; and that the act of the 17th of February, 1876, authorizing counties that levied and collected *ad valorem* taxes, to assess banks and other corporations within said counties, operated as a valid amendment of the appellee's charter to the extent of authorizing the collection of said taxes.

The act of the 14th of February, 1856, provides:

"SEC. 1. That all charters and grants of or to corporations, or amendments thereof, and all other statutes, shall be subject to

amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed. *Provided*, That whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

"SEC. 3. That the provisions of this act shall only apply to charters and acts of incorporation to be granted hereafter."

There is a broad distinction between the extension of a charter and the grant of a new one. An act which continues the life of a charter to a period beyond the time fixed in the charter for its expiration, and reserves the corporate organization, privileges and powers, duties and rights, is an extension of the charter. Thus extended, it is the same charter with a continued lease of life,
123 under which the organization must be kept up; to which the company must look for its powers, privileges and rights; by which it is to be granted and controlled. The act of extension relates back to the date of the charter. The legislature and the company are presumed to contract for the extension with reference to that event, by which the respective rights of the contracting parties were agreed on, which agreement, in consideration of the continuous discharge of the obligations therein expressed, is to be continued beyond the time first agreed on. See Angell & Ames on Corporation, section 780; Temple *v.* Marshall, 1 Gillman, Illinois, 672; Exeter Bank *v.* Rogers, &c., 7 New Hampshire, 32; Lincoln and Kennebec Bank *v.* Richardson, 1 Greenleaf, 72.

Here the legislature, by the act of the 15th of February, 1858, continued the chartered privileges and rights of the appellee twenty years from the first day of October, 1864. This extension did not have the effect of creating a new charter, but merely extended the life of the old one which was already in existence. Therefore the act of the 14th of February, 1856, does not apply, for the third section expressly provides that the act shall only apply "to charters and acts of incorporation to be granted" thereafter.

Conceding, however, that the act of 15th of February, 1858, creates a new charter, was it not the intention of the legislature, "plainly expressed," not in so many words, it is true, that the first section of the act of 1856 should not apply to it? Let us see.
124 The act of 1858, as an additional consideration for the extension, provides that the appellee should establish a bank at Columbus, Ky; that the amount of its circulation should not be greater than the amount of its capital stock actually paid in; that it should, in addition to the fifty cents per share on its capital stock, pay annually fifty cents upon each one hundred dollars of its contingent fund; that it should be subject to all the limitations, conditions and duties imposed upon it by the act of incorporation; that it should formally accept the terms of extension. In addition to this the act of the 1st of March, 1872, authorized the appellee to purchase the stock that the State held in its bank, upon which it was to pay annually fifty cents upon each one hundred dollars, which was to "be in full of all tax or bonus" on such increased stock; also, her charter was "extended twenty-five years." That the appellee, in addition to its former obligation, agreed to pay annually fifty cents

on each hundred dollars of its contingent fund and increased capital stock for the period of twenty-five years; that it was to be exempt from all other taxation thereon during that period; that it was to establish another branch at Columbus, Ky.; that it was to restrict its circulation; that its business involved a large capital, the profits of which were limited to six per cent. interest; that well-defined and permanent rules were essential to its successful management; that changes in its chartered privileges might hazard its success and safety, and render uncertain and precarious a business whose success depended upon a steady adherence upon the part of the State to its plighted faith.

125 These consideration- induce the belief that the acts of 1858 and 1872 were intended to continue in force an irrevocable contract.

FRANKLIN COUNTY COURT
vs.
FARMERS' BANK.

The appellee was chartered in 1850, which was to continue in force until the — day of ——, 1880. By the 15th section of said charter the appellee was required to pay annually into the State treasury fifty cents on each one hundred dollars of its capital stock, "which," according to said section, "shall be in full of all tax or bonus." By an act of the legislature, approved March the 10th, 1876, the appellee's charter was extended for the period of twenty-five years from and after the expiration of the time fixed in said charter. The principles announced in the Bank of Kentucky case, *supra*, apply to this case.

FRANKLIN COUNTY COURT
versus
DEPOSIT BANK OF FRANKFORT.

The appellee was chartered March 3rd, 1863, to continue twenty years. There was no specific tax agreed on in the charter; but by the general law then in force, the appellee was required to pay annually into the State treasury fifty cents on each one hundred dollars of its stock. It may be conceded that, as the appellee and the State, by the terms of the charter, made no contract in refer-

126 ence to taxation, the State would have the power to subject the appellee to the payment of such taxes as are imposed upon persons generally; and that the appellant would have the right to tax the appellee, under the law of 1876. But the legislature, by an act approved March 18, 1871, declared "that the tax or bonus now paid by said bank in future shall be in full of all taxation; but this shall not be construed to apply to city tax upon real estate owned by it."

By an act approved February 23rd, 1882, the appellee's charter, together with the foregoing amendment, was extended and continued in force for twenty-five years from the third of March, 1883.

The language of the amendment of 1871, "in full of all taxation," not only exempts the appellees from the payment of any other tax,

whether county or State, but its meaning is made doubly clear by the succeeding clause that excepts from exemption city taxes on its real estate. Also, if the act of 1876, in the light of the act of 1856, should ordinarily be construed as repealing the exemption from taxation, so far as the appellant is concerned, the act of 1882 puts that matter at rest; for, by said act, the act of 1871 is expressly continued in force, thereby showing that it was the intention of the legislature that the act of 1876 should not apply to the appellee.

THE CITY OF FRANKFORT
versus
THE FARMERS' BANK OF KENTUCKY.

127 From what has been said in the case of The Franklin County Court *v.* The Bank of Kentucky, it follows that the appellant, The City of Frankfort, has no authority to tax the real estate belonging to either of the appellees.

The judgment of the lower court in each case is affirmed.

Clerk's Certificate.

COMMONWEALTH OF KENTUCKY:

I, Abram Addams, clerk of the Kentucky court of appeals, hereby certify that the foregoing 33 pages contain a true, full and complete transcript of the record and proceedings had in said court in the case wherein Franklin County Court, &c., are appellants, and Deposit Bank of Frankfort is appellee, except the proceedings upon and the petition for a rehearing, as the same appears on file and of record in my office.

In testimony whereof I have hereunto affixed the seal of my office. Done at Frankfort, Ky., this 13th day of May, A. D., 1897.

ABRAM ADDAMS,
[SEAL.] *Clerk Kentucky Court of Appeals.*

Exhibit "B" heretofore referred to, is as follows:

128 EXHIBIT "B."

Record from Ct. of Appeals of Ky. in Case of Deposit Bank of Frankfort *v.* Franklin County *et al.*

COMMONWEALTH OF KENTUCKY:

Pleas before the honorable the Kentucky court of appeals, at the capitol, in the city of Frankfort, on the 1st day of June, A. D. 1895, Chief Justice W. S. Pryor, Judges Joseph H. Lewis, James H. Hazelrigg, John R. Grace, Thomas H. Paynter, B. L. D. Guffy, and George B. Eastin sitting.

Transcript from Franklin Circuit Court.

DEPOSIT BANK OF FRANKFORT, Appellant,
versus
FRANKLIN COUNTY and R. D. ARMSTRONG, Sheriff of Franklin County, Appellees.

Be it remembered that heretofore, to wit: on the 16th day of July, A. D. 1894, the appellants by their counsel filed in the office of the clerk of the court of appeals a transcript of record in words and figures following, to wit:

Be it remembered that on the 22nd day of December, 1893, the plaintiff filed the following petition herein, to wit:

Petition in Equity.

Franklin Circuit Court.

DEPOSIT BANK OF FRANKFORT, Plaintiff,
versus
FRANKLIN COUNTY and R. D. ARMSTRONG, Sheriff of Franklin County, Ky., Defendants.
} Petition in Equity.

The plaintiff, The Deposit Bank of Frankfort, says it is a corporation created by an act of the General Assembly of the Commonwealth of Kentucky entitled "An act to incorporate the Deposit Bank
129 of Frankfort," approved March 3rd, 1863, and organized and constituted as such corporation under the corporate name of "Deposit Bank of Frankfort," and doing business in the city of Frankfort under the authority of said act and the several amendments thereto. By the terms of said act the plaintiff, The Deposit Bank of Frankfort, was authorized to transact the business of a bank for the period of twenty years from March 3rd, 1863. It says that "by an act entitled 'An act to amend the charter of the Deposit Bank of Frankfort,' approved March 8th, 1871, it is provided 'that the tax or bonus now paid by said bank (meaning plaintiff) in future shall be in full for all taxation—but this shall not apply to the city

tax on real estate owned by it.'" The tax, or bonus, above referred to, was the 50c. on each $100 worth of its capital stock then required by the general law to be paid by all banks in Kentucky.

It further says that by an act of the General Assembly approved February 23rd, 1882, entitled "An act to extend the charter of the Deposit Bank of Frankfort," all the privileges and franchises granted to said bank under the said act of March, 1863, as amended by act of March 18th, 1871, were extended and continued in force for the period of twenty years from the 23rd day of February, 1882.

Plaintiff alleges that it has not owned, nor has it had in its possession, either in its own right or as agent for any one else, any real estate or any other tangible property which is or was assessable under the law in kind or specie, for any purpose whatever, either State or county, for either of the years 1893 or 1894 inclusive, except office furniture, worth $500.00, which it has assessed with the assessor.

130 Plaintiff further says that it continued to pay annually to the State of Kentucky fifty cents on each one hundred dollars worth of its capital stock in lieu of all tax and bonus against the plaintiff until the act of the legislature, approved May 17th, 1886, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," which act is known as the "Hewitt act," went into effect. The plaintiff says that the first section of the second article of that act has the following provision, to wit:

"That shares of stock in State and national banks, and other institutions of loan and discount and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof equal to one hundred dollars of stock therein owned by individuals, corporations or societies, and said banks, institutions and corporations shall, in addition, pay upon each one hundred dollars of so much of their surplus, undivided surplus, undivided profits or undivided accumulations as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county and municipal."

The next section of the act gives to the auditor of the State power to investigate the books of these corporations and pronounces penalties upon the officers managing them for refusal to allow the investigation of their books. The said act then makes it the duty of the cashier of every incorporated bank whose stocks are re-

131 ported in said act to report on the first day of July of each year said amount of stock and how the same is invested and pay to the treasurer of the State the amount of tax due from the bank.

Section 4 then proceeds as follows, to wit:

"That each of said banks, institutions, and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive or release all rights under the acts of Congress or under the charters of the State banks

to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of each bank and delivered to the governor of this Commonwealth; and upon such agreement being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such bank."

Plaintiff further says that by its proper corporate authority, and with the consent of a majority in interest of a quorum of its stockholders, at a called meeting thereof, held at the said bank on the — day of July, 1887, it did give its consent to the levying of said tax of seventy-five cents on each share of its capital stock equal to one hundred dollars in value, and agree to pay same, together with the same tax as is assessed on real estate, upon so much of its
132 surplus, etc., as exceeds an amount equal to ten per cent. of its capital stock, as in said act provided; and further agreed to waive and release all rights under its charter to a different mode or smaller rate of taxation. Which consent and agreement to and with the State of Kentucky was evidenced by writing under the seal of plaintiff, and delivered by plaintiff to the governor of this Commonwealth on the — day of July, 1887.

Plaintiff says that it has annually, since the above-recited act became a law, through its cashier, reported under oath on the first day of July of each year, to the auditor of public accounts, the true amount of its capital stock, surplus, undivided profits and undivided accumulations, and how such undivided profits and undivided accumulations were invested, and annually paid in July of each year since the said act went into force, up to and including July, 1892, into the treasury of the Commonwealth the whole amount of tax due from respondent, as required by the said act.

By all of which the plaintiff alleges that it has and holds a valid contract under the provisions of the Hewitt act with the Commonwealth of Kentucky, which is irrepealable during its corporate existence, by the terms of which this plaintiff, on its compliance with the conditions imposed on it by the said contract, and which are hereinbefore set out, including the payment of seventy-five cents on each one hundred dollars' worth of its capital stock, and excess of over ten per cent. of its surplus, etc., to the auditor on or before July 1st of each year, is exempt from all and any other
133 taxation, either for county or municipal purposes.

Plaintiff further says that the defendants, Franklin County and John W. Gaines, who was then sheriff of said county, instituted proceedings in the Franklin county court on the — day of ——, 1883, to compel this plaintiff to pay taxes on its capital stock, notes, bills, choses in action, to Franklin county, which proceedings were heard by the said court, which adjudged the plaintiff's property to be liable for said taxation; but plaintiff alleges that by a suit filed in the common pleas court of Franklin county, September 6, 1883, in which this plaintiff was plaintiff and the said Franklin County and Gaines, sheriff, were defendants, the collection of said taxes in favor of said county was enjoined by judgment of the common pleas

court of Franklin county, in which the said suit was filed, upon the ground that the property of this plaintiff was not liable for common taxation by reason of the exemption contained in its said charter, as amended as hereinbefore set out; said judgment was rendered at the May term, 1884, of said court, and an appeal was prosecuted by the said defendants from that judgment in the said court of appeals, in which court of appeals the judgment aforesaid of the said common pleas court was affirmed on June 5, 1888; see opinion in 87th Kentucky Reports, page 375, *et sequitur;* and plaintiff here pleads and relies upon the said judgment in bar of any liability upon it for county taxation. All the papers referred to in this suit are on file in the clerk's office of this court, and are here referred to as parts hereof.

134 The plaintiff avers that the legislature of Kentucky, in violation of said contract and of its duty, and against the will and consent of the plaintiff, passed an act which became a law November 11, 1892, without the approval of the governor, by the terms of which it attempted to repeal the above-recited Hewitt act, and impose on the plaintiff a liability for both county and municipal taxes. But plaintiff is advised and avers that said last-named act, in so far as it attempts to repeal said Hewitt act and to impose any liability upon plaintiff for county and municipal taxes, is an impairment of plaintiff's aforesaid contract under said Hewitt act, and is utterly void and of no effect, being in conflict with the constitution of Kentucky, and of section 10, article 1 of the Constitution of the United States, which prohibits the enactment of laws by any State impairing the obligations of contracts.

Plaintiff avers that on the first day of July, 1893, under protest, and without waiving any of its rights under the contract hereinbefore set out, this plaintiff did make and deliver to the auditor of public accounts of this State, a statement verified by its president, and upon the form or blank provided by the auditor for that purpose, giving all the facts required to be stated and shown by section 2 of article 3 of said act of November 11, 1892, and tendered to the said auditor on the first day of July, 1893, at his office in Frankfort, Ky., the sum of $705.42, being the amount of taxes due from plaintiff for the year 1893, at 75 cents on the $100 worth of its capital stock, and the tax due from the surplus and undivided surplus, undivided profits and undivided accumulations in excess of ten

135 per cent. of its capital stock, as required by said Hewitt act, but the said tender was refused by the said auditor, and thereupon, but under protest, plaintiff paid to said auditor, on said date, $464.29, the State tax claimed to be due from the plaintiff under the aforesaid act of November 11, 1892.

Notwithstanding all the facts hereinbefore alleged, the State board of valuation and appraisement, created by said act of November 11th, 1892, has made a pretended assessment of the alleged franchise of this plaintiff for the year 1893 at the sum of $109,246.31, and has certified the same to the county clerk of Franklin county, and said county has listed the same with the defendant R. D. Armstrong, sheriff of said county, who now has the same in his hands, and who

has threatened to levy on plaintiff's property and to sell the same to raise $619.05, which he claims is the amount of tax due from plaintiff to said county upon its alleged franchise for the year 1893, and unless prevented will sell same to satisfy the said alleged taxes.

Plaintiff avers that none of its property is subject to or liable for taxation for county purposes, in any manner or form; that said board has no right, authority or jurisdiction to make said alleged assessment of the value of plaintiff's franchise for taxation for county or other purposes; that said alleged assessment is made up and consists of the capital stock of plaintiff and its surplus and no other or different property, and is an attempt to tax plaintiff's capital stock and surplus in violation of plaintiff's aforesaid contract under the Hewitt act, which declares that upon the
136 acceptance by plaintiff of the terms and conditions of said act, hereinbefore set out, "such bank and its" shares of stock shall be exempt from all other taxation whatsoever "so long as said tax shall be paid during the corporate existence of said bank."

Plaintiff alleges that it has no remedy at law adequate for its protection against the wrongs hereinbefore set out and complained of; that it would sustain great and irreparable injury from a levy or a sale of its property by said sheriff to satisfy said taxes; and will sustain irreparable injury unless the said levy or sale be immediately enjoined and restrained; that no previous injunction herein has been asked of or applied for or refused by this court or any circuit judge.

Wherefore plaintiff prays that the defendant, R. D. Armstrong, sheriff, be enjoined and restrained from making any levy on plaintiff's property, and from subjecting any property of plaintiff to sale under said tax-list to satisfy any taxes alleged or claimed to be due to Franklin county on any property of this plaintiff; and that defendant Franklin County be enjoined and restrained from assessing or collecting, and from attempting to assess or collect in any manner, any tax whatever upon plaintiff's property or franchise for county purposes hereafter during plaintiff's corporate existence under its said charter; and it prays for costs, and for all other proper relief.

FRANK CHINN,
For Plaintiff.

137 B. Milam says he is president of the Deposit Bank of Frankfort, and that he believes the foregoing statements are true.

B. C. MILAM.

Sworn to and subscribed before me, this 22nd day of December, 1893.

C. E. JAMES,
D. C., F. C. C.

Thereupon, the plaintiff filed the following injunction bond herein, to wit:

Injunction Bond.

Franklin Circuit Court.

DEPOSIT BANK OF FRANKFORT, Plaintiff,
versus
FRANKLIN COUNTY and R. D. ARMSTRONG, Sheriff of Franklin County, Defendants. } Injunction Bond.

We undertake that the plaintiff, The Deposit Bank of Frankfort, Ky., shall pay to the defendants, Franklin County and R. D. Armstrong, sheriff of Franklin county, the damages, not exceeding thirteen hundred dollars, which they, or either of them, may sustain if it be finally decided that the injunction ought not to have been granted.

Witness our hands this 22d day of December, 1893.

B. C. MILAM, *President.*
B. C. MILAM.

Thereupon, the following injunction order was granted, as follows, to wit:

138 *Order of Injunction.*

Franklin Circuit Court.

DEPOSIT BANK OF FRANKFORT, Plaintiff,
vs.
FRANKLIN COUNTY and R. D. ARMSTRONG, Sheriff, Defendants. } Order of Injunction.

This day came the plaintiff by attorney and made application for an order of injunction, and it appearing that the judge of this court is absent from Franklin county, and the undersigned, clerk of this court, being satisfied that great and irreparable injury and damage will result to the plaintiff if the injunction prayed for in this action be not immediately granted, an injunction is granted and will be issued by the clerk of this court, agreeably to the prayer of the petition herein, upon the execution by the plaintiff of a bond before said clerk with good security to the effect that the plaintiff will pay to the defendants such damages as they may sustain, not exceeding $1,300, if it be decided that the injunction ought not to have been granted.

December 22d, 1893.

THOS. B. FORD, *C. F. C. C.*

Thereupon the following injunction was issued, as follows, to wit:

Order of Injunction.

Franklin Circuit Court.

DEPOSIT BANK OF FRANKFORT
versus
FRANK*fort* COUNTY, KENTUCKY, &C. } Order of Injunction.

The Commonwealth of Kentucky to Franklin County, Kentucky, and R. D. Armstrong, sheriff of Franklin county, Kentucky:

139 You and each of you are hereby enjoined and restrained from making any levy on plaintiff's property and from subjecting any property of plaintiff to sale under said tax-list to satisfy any taxes alleged or claimed to be due to Franklin county, or any property of this plaintiff; and that defendant, Franklin County, be enjoined and restrained from assessing or collecting and from attempting to assess or collect in any manner, any tax whatever upon plaintiff's property or franchise for county purposes, hereafter, during plaintiff's corporate existence under its said charter.

Attest:
THOS. B. FORD, *C. F. C. C.*,
By C. E. JAMES, *D. C.*

December 22, 1895.

Return.

Endorsed: Executed by delivering a true copy of the within injunction to B. G. Williams, judge of Franklin county, and R. D. Armstrong, sheriff of Franklin county, this 22nd day of December, 1893. W. S. Dehoney, C. of F. Co.

Thereupon the following summons was issued, as follows, to wit:

Equity Summons.

The Commonwealth of Kentucky to the coroner of Franklin county, Greeting:

You are commanded to summon Franklin County, Ky., and R. D. Armstrong, sheriff of Franklin county, Ky., to answer on the first day of next January term of the Franklin circuit
140 & 141 court, a petition filed against them in said court by Deposit Bank of Frankfort, and warn them that upon failure to answer, the petition will be taken for confessed, or they will be proceeded against for contempt, and you will make due return of this summons on the first day of the next January term of said court.

Witness, Thos. B. Ford, clerk of the said court, this 22d day of December, 1893.

THOS. *F.* FORD, *Clerk*,
By C. E. JAMES, *D. C.*

Return.

Endorsed: Executed by delivering a true copy of the within summons to B. G. Williams, presiding judge of Franklin county, *of* R. D. Armstrong, sheriff of Franklin county. W. S. Dehoney, C of F. Co.

Executed by delivering a true copy of the within summons and injunction to R. D. Armstrong, sheriff of Franklin county, and B. G. Williams, judge of Franklin county, this 22d day of December, 1893. W. S. Dehoney, C. of F. Co.

Afterwards, at a court held on the 27th day of January, 1894, the following judgment was rendered herein, to wit:

Judgment.

DEPOSIT BANK OF FRANKFORT
vs.
R. D. ARMSTRONG, ETC. } Judgment.

The plaintiff filed its amended petition herein, to which the
142 defendants demurred; said demurrer to the petition as amended was sustained, to which ruling the plaintiff excepts, and declining to amend further, the court filed an opinion herein, and it is adjudged that the plaintiff's petition be dismissed, and that defendants recover of plaintiff their costs herein.

To all of which plaintiff excepts, and prays an appeal to the court of appeals, which is granted.

Said amended petition is as follows, to wit:

Amended Petition.

Franklin Circuit Court.

DEPOSIT BANK OF FRANKFORT
vs.
FRANKLIN COUNTY and R. D. ARMSTRONG, Sheriff. }

The plaintiff amends its petition herein by adding thereto and alleging that before the institution of this action, to wit: on the — day of ——, 1893, the defendant, R. D. Armstrong, who was then the duly elected, qualified and acting sheriff of Franklin county, filed in the office of the clerk of the county court for Franklin county a report, stating that plaintiff had failed to list for taxation with the assessor of Franklin county for 1891 (the taxes to be paid in 1892) and for 1892 (the taxes to be paid in 1893) notes, money, choses in action and other property, all of the value of $99,001.87 for 1892 and of the value of $100,000 for 1891; which is the same property, the taxes on which are sought to be enjoined in this action; summons was issued on said information, commanding plaintiff to appear at the ensuing

term of said county court and show cause, if any it could, why its
143 property aforesaid should not be listed at the amounts aforesaid for taxation; that thereafter, to wit: on the — day of May, 1893, plaintiff appeared and filed its response, showing that it was not required by law to give in to the assessor its property for taxation and that it had reported to the auditor, as required by law; and said court held and adjudged that plaintiff was not delinquent as to any of its property or assets and dismissed the said proceedings at the cost of said county; that thereupon The County of Franklin, as relator, made and perfected an appeal to this court from said order, and the said appeal was heard at the September term, 1893, of this court, and a judgment was at said term rendered, dismissing said proceedings at cost of said county, to which judgment said county excepted and prayed an appeal to the court of appeals, which was granted. And the plaintiffs in said proceedings, who *are* the defendants in this suit, *have* filed a transcript of the record of said proceedings in the clerk's office of the court of appeals and is in said court of appeals, prosecuting its said appeal. Wherefore plaintiff prays as in its petition.

FRANK CHINN,
For Plaintiff.

Said opinion of the court is as follows, to wit:

Opinion.

This is a suit to enjoin the collection of county taxes levied under the provisions of the new revenue act which became a law Nov. 11th, 1892.

The petition sets out at length the charter of the bank, the
144 amendments thereto and the decisions of the court of appeals wherein it is held that the provisions of the original and amended charter-, created and constituted an irrevocable contract from which the State could not withdraw or recede without the consent of the bank. That the bank had such a contract with the State from the time it was chartered in 1834 to the time it accepted the provisions of the revenue law of 1886 known as the Hewitt bill can hardly be questioned in the light of the adjudication touching the chartered rights and privileges of this and like institutions.

In 1887 the plaintiff accepted the provisions of the Hewitt law in the manner prescribed therein, and it alleges that this acceptance made a contract with the State of the same binding force and validity although different in terms as the contract it had under its charter and that the effort of the State or any of its subdivisions to collect any other tax than that mentioned in the act of 1886, is in violation of the provisions of the constitution- of the State and the United States. To the petition the defendant enters a general demurrer; it therefore devolves on this court to construe article 2 of the act of 1886 and in like manner pass upon the validity of the *of the* new revenue act of 1892. Section 1 of article 2 of the Hewitt bill provides that each share of stock equal to $100 shall be taxed

75c., and that all surplus exceeding 10 per cent. of the capital stock shall be assessed at the same rate as real estate is assessed and that the taxes on these shares and surplus shall be in full of all tax, State, county and municipal.

Section 4 of the same article provides how the banks "may give consent to the levying of said tax, and agree to pay the same
145 as herein provided and to waive and release all rights under the acts of Congress and under the charters of the State banks to a different mode or smaller rate of taxation, and upon such agreement, and consent being delivered and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such a bank."

The language of these two sections is strong and seems to embody all the essential qualities necessary to constitute a valid contract between the banks and the State during the corporate existence of the banks accepting its provisions, and it is equally explicit in that only the tax on the shares of stock and the surplus therein defined shall be levied and collected.

It is contended, however, on the part of the defendant that sections 6 and 7 of the same article place certain limitations upon the provisions just above recited, and that the State intended to reserve and did reserve to itself the right and power to amend, repeal, modify, and enlarge the scope and meaning of the terms and conditions imposed by sections 1 and 4. Section 6 is that the act under consideration shall be subject to the provisions of what is known as the act of 1856, the language of which is:

"That all charters and grants of or to corporations or amendments thereof enacted or granted since the 14th of February, 1856, and all other statutes shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein
146 plainly expressed." Section 7 provides that in case any bank refuses to pay the tax imposed under this act ("Hewitt bill") it shall be taxed for State, county, and municipal purposes as the taxable property in the hands of individuals, and it also provides "that nothing herein contained shall be construed as exempting from taxation for county and municipal purposes any real estate or building owned or used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed."

This is, indeed, a confused and contradictory statute; the language of one section indicates that in case the bank pays the tax it shall be exempt from all other taxation during the corporate existence of the bank, while another section provides that this exemption shall be only during the will and pleasure of the legislature. One section says that if the bank will pay 75 cents tax on each $100.00 share of its stock and the tax on its surplus, it shall be exempt from all other tax whatsoever, while another section says its real estate "may be taxed for county and municipal purposes," yet its real estate is as much represented by its shares of stock as any other asset of the bank.

Much has been appropriately said about the times and circumstances surrounding the passage of the Hewitt bill; that it was an effort on the part of the State to adopt an uniform system of taxation for this class of property; that the State was sadly in need of the revenue which the increased tax of 25 cents per share of stock would yield; that the banks which had contract rights under their charters were willing to surrender them and be placed on the
147 same footing as those which had none, but that in accepting the provisions of the Hewitt bill they believed they were securing another contract of as binding force as the one surrendered, and that the State cannot afford to practice bad faith in making promises she did not intend to keep.

It is further said with equal force that if the banks are compelled to pay taxes as required by the present revenue law the equality of taxation among banks will be destroyed, that certain county and municipal taxes will amount almost to the earnings of the capital stock of the banks in those localities—that bank capital receives but little if any benefit from county or municipal governments, while other classes of property receive many other benefits which the banks do not receive. On the other hand, this court cannot ignore the recent political history of the State which imposed upon the legislature the necessity of enacting a law of which the plaintiff now complains.

When the new constitution was being discussed before the people for adoption or rejection none of its provisions were more clearly defined or understood than those relating to taxation, and many bank officers and stockholders were earnest advocates for its adoption. And it is a fact that every banking community voted for the adoption of the new constitution, and those communities having the greatest number of banks gave therefor the largest majorities.

In view of these facts it can hardly be contended that the holders of bank stock, especially those who favored the adoption of the new constitution, believed that they held an irrevocable contract under the Hewitt bill.

148 But it is contended on the part of the plaintiff that section 6 of article 2 of the Hewitt bill was not intended to apply to sections 1 and 4 of the same article—that it has no more significance than if it were placed in article 1 or article 12. If such be the case, it ought to go a long ways towards maintaining the position that the terms of article 2 constituted a contract with the banks. In no other article of the bill, however, is reference made to the act of 1856, and in ascertaining the intention of the legislature, the courts will be governed not only by the language of the act, the position which one section thereof bears to the other—the purposes for which the law was adopted, and also by the history of the bill as contained in the journals kept by the two houses of the General Assembly. The journals of the senate and house of representatives show that the Hewitt bill, which contains twelve articles, was considered more or less article by article, and that article 2 was considered by each house as if it constituted a separate act in itself. Efforts were made to exempt this article from the act of 1856, and

without success. Failing in this, provision was attempted to be made that the act of 1856 should not apply to the provisions of article 2 until after the expiration of ten years, and this amendment was likewise defeated. The position of section 6 in article 2, together with the history of its enactment as shown by the journal of the two houses, clearly indicate the legislative intent.

After the passage of the Hewitt bill the plaintiff had the option to accept or reject its provisions. It elected to surrender its con-
149 tract under its charter and accept those provisions, and having so elected, this court is of the opinion that it cannot now be heard to say that the repeal of the Hewitt bill restored it to its original status under its charter.

It is ordered that the demurrer to the plaintiff's petition as amended be sustained, to which ruling of the court the plaintiff excepts, and the plaintiff being given leave, but declining to plead further, it is ordered that the petition be dismissed and that the defendants recover their costs herein expended, and to all of which the plaintiff objects and excepts, and prays an appeal to the court of appeals, which is granted.

Clerk's Certificate.

STATE OF KENTUCKY, *Franklin County,* } *set:*

I, Thos. B. Ford, clerk of the Franklin circuit court, do hereby certify that the foregoing 23 pages contain a true, perfect and complete transcript of all the pleadings, orders and proceedings, in the case mentioned therein, taken from the records of my said office.

Given under my hand as clerk of the court aforesaid, this 23rd day of February, 1894.

THOS. B. FORD, *Clerk.*

Upon which transcript was endorsed the following statement:

Statement.

DEPOSIT BANK OF FRANKFORT, Appellant,
versus
FRANKLIN COUNTY and R. D. ARMSTRONG, Sheriff, Appellees. } Statement.

150 The judgment appealed from was rendered on January 27, 1894, and may be found on page 15 of this record. Appeal granted below. No summons to issue.

FRANK CHINN,
For Appellant.

Afterwards, at a court of appeals, begun and held for the Commonwealth of Kentucky, at the capitol, in the city of Frankfort, on the 25th day of October, A. D. 1894, the following order was entered:

Orders as to Argument.

DEPOSIT BANK OF FRANKFORT
versus
FRANKLIN COUNTY, &c. } Franklin. (3 Cases.)

Ordered that the foregoing cases be continued for oral argument.

Afterwards, at a court of appeals, held as aforesaid, on the 5th day of March, A. D. 1895, the following order was entered:

DEPOSIT BANK OF FRANKFORT
versus
FRANKLIN COUNTY, &c. } Franklin. (3 Cases.)

By agreement of all the parties and on their motion, it is ordered that these seventeen cases be heard together, and said causes coming — to be heard were argued by A. P. Humphrey for the banks and Ira Julian for the Commonwealth, counties and cities, and laid over until tomorrow for further hearing.

151 Afterwards, at a court of appeals held as aforesaid, on the 12th day of March, 1895, the following order was entered:

These causes again coming on to be heard, were argued by Wm. J. Hendrick for the Commonwealth and submitted.

Afterwards, at a court of appeals held as aforesaid, on the 1st day of June, 1895, the following order was entered:

Judgment.

DEPOSIT BANK OF FRANKFORT, Appellant,
versus
FRANKLIN COUNTY, &c., Appellees. } Appeal from Franklin Circuit Court.

The court being sufficiently advised, it seems to them the judgment herein is erroneous.

It is, therefore, considered that said judgment be reversed and cause remanded for further proceedings consistent with the opinion herein; which is ordered to be certified to said court.

It is further considered that the appellant recover of the appellees its costs herein expended.

Judges Lewis, Paynter and Guffy dissenting.

Dissenting opinion by Paynter.

Exhibit "C" is in words and figures as follows, to wit:

152 EXHIBIT "C."

Judgment of Franklin Circuit Court on Mandate from Court of Appeals in Case of Deposit Bank v. Franklin Co.

Franklin Circuit Court, February 1, 1896.

DEPOSIT BANK OF FRANKFORT
versus
FRANKLIN COUNTY, &c. } Judgment.

The plaintiff having heretofore filed a notice accepted by the defendants' attorney, together with the mandate and opinion of the court of appeals in this action, and the defendants by their attorneys waiving the filing of said mandate in the clerk's office as required by law, and consenting to the submission of the case for judgment at this time, it is now ordered and adjudged in accordance with the mandate and opinion of said court in this action, that article 2, of the act of the General Assembly entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886 (General Statutes, chap. 92, art. 2), and the acceptance of the provisions thereof by the plaintiff constituted a contract between the plaintiff and the Commonwealth, which the latter cannot alter or change without the consent of the former; by the terms of which contract the plaintiff cannot, during the continuance of its charter, be assessed for taxation or taxed for State purposes in a different mode or at a greater rate of taxation than as provided for in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon any real estate it may own; that the provisions of the present constitution of this State and of the act of November 11, 1892 (art. 3, chap. 103, Acts 1891–'2–'3),
153 in so far as they were intended to provide for any assessment or taxation of the plaintiff's property, rights of property or franchise, except its real estate, are in violation of and repugnant to the Federal Constitution and void; that the board of valuation and assessment provided for in said act of November 11, 1892, had, and has no authority in law to assess or value the plaintiff's franchise for taxation, or the auditor to apportion or certify the same, or any part of the same, for county or municipal taxation; that the temporary injunction which was granted in this cause at the commencement of the action be, and the same is now, hereby made perpetual, and the defendants, and each of them, are perpetually enjoined and restrained from levying upon or selling any property of the plaintiff for the purpose of collecting any taxes for the county of Franklin upon the franchise or property of the plaintiff, except upon its real estate.

And it is further adjudged that the plaintiff recover of the defendants its costs in this action expended.

To all of which the County of Franklin excepts, and prays an appeal to the court of appeals, which is granted.

A copy.
Attest:

THOS. B. FORD,
Clerk Franklin Circuit Court.

Exhibit "D," heretofore referred to, is in words and figures following to wit:

154 EXHIBIT "D."

Record from Franklin Circuit Court in Case of Board of Councilmen of the City of Frankfort *v.* Deposit Bank of Frankfort.

Franklin Circuit Court, January Term, 1896.

Pleas before the Hon. James E. Cantrill, judge.

BOARD OF COUNCILMEN OF THE CITY OF Frankfort, Plaintiff,
versus
THE DEPOSIT BANK OF FRANKFORT, Defendant. } Petition in Equity.

Petition in Equity.

Plaintiffs state that Frankfort is a city of the third class and that plaintiffs are a body politic and corporate, with power to sue and be sued, contract, &c.; defendant is a bank and corporation organized under the laws of the State of Kentucky; such was the status and character of the said parties hereto in 1891, and has been ever since said date.

The defendant is indebted to the plaintiff in the sum of $4,243.10 taxes, and $299.31 penalty and interest on the '93 and '94 tax at the rate of 10 per cent. per annum from the time the same became due until the present date, said interest amounting at this date to $——. In each of the years 1892, '93 and '94 the Board of Councilmen of the City of Frankfort levied a tax for city purposes upon all the taxable property of the city as follows: For 1892, $1.25 per hundred dollars; for 1893, $1.30 per hundred dollars; 1894, $1.40 per hundred dollars. In each of said years the taxable property of defendant within said city was regularly and legally assessed for taxation for city purposes as follows: 1892, notes, money, choses in action and other property of the value of $100,000; 1893, franchise valued at $109,246.31; 1894, franchise valued at $112,278.91, the total
155 tax being $4,243.10.

The assessment for 1892 was made by the tax collector of the city of Frankfort pursuant to section 123 of the city charter, the assessments for 1893 and 1894 were made by the State board of assessment, pursuant to article 3 of the general revenue law, each of said assessments were regularly certified as required by law to

the tax collector of the city of Frankfort and returned by him no property found from which to make the said taxes, penalties or interest. The tax for 1893 became due July 1, 1893; that for 1894 became due July 1, 1894; no part of said taxes, penalty, or interest has been paid, though legally demanded by the tax collector.

Wherefore plaintiff prays that *they* recover of defendant the sum of $4,243.10 taxes, $299.31 penalty, and interest upon $1,421.20, "1893 tax," from July 1, 1893, until paid, and upon $1,571.90, "1894 tax," from July 1, 1894, until paid at the rate of 10 per cent. per annum and for an attachment against the property of defendant. Plaintiff prays for costs and all proper relief.

HUGH RODMAN,
City Attorney,
W. H. JULIAN,
Attorneys.

Ira Julian, mayor, says he believes the foregoing statements to be true.

IRA JULIAN, *Mayor.*

Sworn to and subscribed before me this 22nd day of August, 1894.

C. E. JAMES,
D. C., F. C. C.

156 *Equity Summons.*

The Commonwealth of Kentucky to the sheriff of Franklin county, Greeting:

You are commanded to summon the Deposit Bank of Frankfort to answer, on the first day of next September term of Franklin circuit court, a petition in equity filed against it in said court by the Board of Councilmen of City of Frankfort, and warn it that upon failure to answer, the petition will be taken for confessed, or it will be proceeded against for contempt, and you will make due return of this summons on the first day of the next September term of said court.

Witness, Thos. B. Ford, clerk of the said court, this 22nd day of August, 1894.

THOS. B. FORD, *Clerk,*
By C. E. JAMES, *D. C.*

Return.

Endorsed: Executed by Ben. Milam, president of Deposit bank, by delivering him a copy of the within summons this August 22nd, 1894. R. D. Armstrong, S. F. C.

Defendant's Demurrer to the Petition.

Franklin Circuit Court.

BOARD OF COUNCILMEN OF THE CITY OF Frankfort, Plaintiff,
vs.
DEPOSIT BANK OF FRANKFORT, Defendant.
} Defendant's Demurrer to the Petition.

The defendant demurs to the plaintiff's petition herein because the same does not state facts sufficient to constitute a cause of action.

FRANK CHINN,
For Defendant.

157 *Order on Demurrer.*

Franklin Circuit Court, September 27, 1894.

BOARD OF COUNCILMEN OF CITY OF FRANKFORT
versus
DEPOSIT BANK OF FRANKFORT.
} Order.

The demurrer to the petition being heard, said demurrer is sustained as to the taxes claimed for 1892, and as to all penalties and interest claimed on taxes for 1893 and 1894, and leave is given plaintiff to amend its petition as to said taxes for 1892 and penalties and interest for taxes of 1893 and 1894, but plaintiff declining to amend, but electing to stand by its petition, the said petition is dismissed so far as it seeks to claim any taxes from defendant for 1892, or any penalties or interest on any taxes for 1893 and 1884, to all of which plaintiff excepts.

And said demurrer is overruled as to the taxes claimed for 1893 and 1894, to which defendant excepts.

And thereupon defendant filed its answer.

Answer of Defendant.

Franklin Circuit Court.

BOARD OF COUNCILMEN OF THE CITY OF Frankfort, Plaintiff,
vs.
DEPOSIT BANK OF FRANKFORT, Defendant.
} Answer of Defendant.

Filed September 27, 1894.

Par. 1. The defendant, Deposit Bank of Frankfort, denies that it is indebted to the plaintiff, Board of Councilmen of the City of Frankfort, in the sum of $4,243.10 taxes, or $299.31 penalty,
158 or in any part of either of said sums alleged as taxes and penalties; denies that it is indebted for interest on the 1893

or 1894 alleged tax at the rate of ten per cent. per annum from the time the same became due until the present date, or at any other rate, or for any other time, and denies that any such alleged interest amounts to $—, or any other sum; denies that in each or either of said years 1893 or 1894 this defendant was the owner of any property which was or is assessable or taxable by the city, and denies that any property of defendant was regularly or legally, or at all, assessed for taxation for city purposes at $100,000 for 1892, or $— its franchise for 1893 at $109,246.31, or its franchise for 1894 at $112,278.91, and denies that the alleged total tax amounts to $4,243.10, as alleged; denies that any of defendant's property was subject or liable for city taxes for 1892, and denies that the tax collector of the city had any right or authority to assess any of defendant's property, or that he did assess it for taxation for 1892; denies that the alleged assessments for 1893 or 1894, or either of them, was certified as required by law, to the city tax collector; and denies that the said alleged taxes or assessments were returned by the tax collector No property found to make said taxes, penalties or interest; denies that the alleged tax for 1893 became due July 1, 1893, or at any other time, or that for 1894 became due July 1, 1894, or at any other time.

Par. 2. Further answering, the defendant says it is a corporation created by an act of the General Assembly of the Commonwealth of Kentucky, entitled "An act to incorporate the Deposit Bank of Frankfort," approved March 3, 1863, under which act this
159 defendant was duly organized and constituted as such corporation under its said corporate name, "Deposit Bank of Frankfort," and begun the business of a bank, as authorized by its said charter, 1868, and has since then been continuously engaged in said business under the authority of said act and of the amendments thereof, which are hereinafter set out.

By the terms of said act this defendant was authorized to transact the general business of a bank for a period of twenty years from March 3, 1863.

Said act was amended by an act of said assembly, entitled "An act to amend the charter of the Deposit Bank of Frankfort," approved March 8, 1871, which amendment provides "that the tax or bonus now paid by said bank (meaning this defendant) in future shall be in full of all taxation. But this shall not apply to the city tax on real estate owned by it." The tax or bonus above referred to, was the fifty cents on each one hundred dollars' worth of its capital stock then paid by the defendant under the laws of the State in force at that date.

By another act of said General Assembly, approved February 23, 1882, entitled "An act to extend the charter of the Deposit Bank of Frankfort," all the privileges and franchises granted to defendant by said act of March, 1863, as amended by the act of March 17, 1871, were extended and continued in force for the period of twenty years from March 3, 1882.

Defendant has not owned nor has it had in its possession either in its own right or as agent for any one else, any real estate or any

other tangible property, which is or was assessable in kind
160 for taxation for either of the years 1892, 1893, or 1894, for any purpose whatever, either State, county or municipal.

Defendant avers that it continued to pay annually to the State of Kentucky fifty cents on each one hundred dollars' worth of its capital stock in lieu of all tax or bonus against defendant until the act of the said General Assembly, approved May 17, 1886, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," went into effect. The first section of the second article of that act has this provision:

"That shares of stock in State and national banks, and other institutions of loan and discount, and in all corporations required to be taxad by law on their capital stock, shall be taxed seventy-five cents on each share thereof, equal to one hundred dollars of stock therein owned by individuals, corporations or societies, and said banks, institutions and corporations shall in addition pay upon each one hundred dollars of so much of their surplus, undivided profits or undivided accumulations, as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county and municipal."

The next section of said act gives to the auditor of the State power to investigate the books of the corporation described in the section above quoted, and pronounces penalties upon the officers
161 managing them for refusal to allow investigation of their books for the purposes of assessment. The said act then makes it the duty of the cashier of every incorporated bank whose stocks are taxed by said act to report on the first day of July, each year, the amount of stock and how the same is invested, and pay to the treasurer of the State the amount of tax due from the bank. Section four of said act reads as follows:

"That each of said banks, institutions, and corporations, by its proper corporate authority, with the consent of a majority in the interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive or release all rights under acts of Congress, or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of each bank, and delivered to the government of this Commonwealth; and upon such agreement being delivered, and in consideratlon thereof, such bank and its shares of stock shall be exempt from all other taxation whatever, so long as said tax shall be paid during the corporate existence of such bank."

Defendant avers that by its proper corporate authority and with the consent of a majority in interest of a quorum of its stockholders, at a called meeting thereof, held at the said bank on the — day of July, 1887, it did give its consent to the levying of said tax of
162 75c. on each share of its capital stock equal to one hundred dollars in value and agreed to pay same together with the same tax as is assessed on real estate upon so much of its surplus,

&c., as exceeds an amount equal to 10 per cent. of its capital stock, as in said act provided, and further agreed to waive and release all rights under its charter to a different mode or smaller rate of taxation. Which consent to and with the State of Kentucky was evidenced by writing executed by the defendant under its corporate seal, and delivered by defendant to the governor of this Commonwealth on the — day of July, 1887.

Defendant avers that it has annually since the above-recited act became a law, through its cashier, reported under oath on the first day of July of each year, up to and including July, 1892, to the auditor of public accounts the true amount of its capital stock, surplus, undivided profits and undivided accumulations, and how such undivided profits and undivided accumulations were invested, and has annually, up to and including July, 1892, paid into the treasury of the Commonwealth the whole of the tax due from defendant, as required by said act. On the first days of July, 1893 and 1894, plaintiff tendered and offered to make the aforesaid report to the auditor, and to pay the full amount of tax required by said act for the years 1893 and 1894, to wit: 75c. on the hundred dollars' worth of its capital stock, and upon so much of its surplus, undivided profits or undivided accumulations as exceeded an amount equal to 10 per cent. of its capital stock, the same rate of taxation that was assessed upon real estate for
163 those years, but the said auditor refused to accept the said report and the said payments, upon the ground that he had then no authority to accept the same, claiming that the act of May 17th, 1886, had been repealed by the act of the legislature of Kentucky, which became a law without the approval of the governor, on the 11th day of November, 1892.

Defendant avers that the said act of November 11, 1892, was passed without the consent and against the will of the defendant and in so far as it attempts to repeal the defendant's said contract under the act of May 17, 1886, and impose upon defendant a liability for county and municipal taxation, is an attempt to impair the obligations of the defendant's aforesaid contract under the act of May 17, 1886, and is utterly void and of no effect, being in violation of the constitution of Kentucky, and in violation also of section 10, article 1, of the Constitution of the United States, which prohibits the enactment of laws by any State impairing the obligations of contracts.

Defendant avers that it has complied with all the terms and conditions required of it by the aforesaid act of May 17, 1886, and that it has by the terms of said act, a contract with the State of Kentucky, which is irrepealable by the said State, during the corporate existence of this defendant, and which contract provides, that upon the acceptance by defendant of the terms and conditions of said act, this defendant "and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence" of this defendant.

And defendant avers that in the suit of this defendant
164 against Franklin county heretofore decided by this honorable court it was decided that the defendant's charter as amended,

constituted an irrevocable contract between this defendant and the State of Kentucky, by the terms of which this defendant was required to pay annually to the treasurer of Kentucky fifty cents on each hundred dollars' worth of its capital stock, in full of all tax or bonus, and that this defendant nor its capital stock could be made liable for any other tax or bonus. Which decision was appealed to the court of appeals of Kentucky, and affirmed by said court. (See opinion in 87 Kentucky Reports, p. 375.) The papers and proceedings in said suit are here referred to as parts hereof, together with the mandate and opinion of the court of appeals on file therewith.

By the terms of the act of November 11, 1892, above referred to, it is provided that all banks and other corporations, besides the taxes to the State treasury therein provided for, should also pay to the counties and cities in which they may be situated or doing business, taxes not only on all their tangible property located in such counties and cities, but also on the "franchise" of such corporations, by which term is meant all the other property and assets of the corporations; that said county and municipal taxation shall be at the same rate at which other property is assessed or taxed.

Defendant avers that the property attempted to be subjected to municipal taxation in this suit, is all intangible property, and was reported by defendant to the State board of assessment and valuation, and was by said board estimated and included in said board's assessments and valuation of this defendant's franchise for the years 1893 and 1894.

165 Defendant alleges that notwithstanding it was compelled to and did pay to the treasurer of Kentucky on the first day of July, 1892, the full amount of tax due from it to the State under the terms of its said contract with the State, known as the Hewitt bill, the plaintiff is demanding in this suit from defendant taxes for the year 1892 upon the same property upon which defendant paid taxes for that year to the State. And is in addition claiming taxes upon the alleged assessment and valuation of defendant's franchise, the county of Franklin is claiming against the defendant taxes for county purposes for the years 1893 and 1894, which said sums claimed for local taxes, when added to the amount paid by defendant to the State of Kentucky for each of those years will make an amount largely in excess of the amount that could be claimed of this defendant under the said act of May –7, 1886.

Defendant avers the State board of assessment and valuation had no power or authority to make any assessment or valuation of defendant's franchise, and that the plaintiff has no right or authority to demand, collect or receive any taxes from defendant or any penalty or interest for non-payment of any taxes.

Wherefore defendant prays that the petition be dismissed; that the defendant's contract under the Hewitt bill be sustained and declared valid and binding by the court; that plaintiff be enjoined and restrained from assessing or attempting to assess, and from

collecting or attempting to collect from defendant any tax
166 upon defendant's property or franchise, except upon any real estate defendant may hereafter acquire, if any; and it prays for costs and for all other proper relief.

FRANK CHINN,
For Defendant.

B. Milam says he is president of the Deposit Bank of Frankfort, and he believes the statements in the foregoing answer contained are true.

B. C. MILAM,
President Deposit Bank of Frankfort.

Sworn to before me by B. Milam, this 20th day of September, 1894.

U. KEENAN,
Notary Public.

Judgment.

Franklin Circuit Court, February 1st, 1896.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Plaintiff,
versus
DEPOSIT BANK OF FRANKFORT, Defendant. } Judgment.

It appearing to the court that this action has been continued and not heretofore submitted, by agreement between the plaintiff and defendant by their respective attorneys, that this action should stand upon the answer filed by the defendant, until the decision by the court of appeals in the two cases appealed from this court, in one of which the defendant bank was plaintiff and The County of Franklin, &c., were defendants, and in the other the Common-
167 & 168 wealth, for the use of said county, was plaintiff and the defendant bank was defendant, and the liability of the bank for the taxes claimed in this case should be settled and determined by the decision of the court of appeals in said two cases, the defense relied on in this case being the same contract set up and relied upon by the bank in those two cases; and it further appearing to the court by the mandates and opinions of the court of appeals filed in said two cases, that the court of appeals has sustained the defense set up and relied on by the bank in said two cases based upon the contract made by the bank under the Hewitt bill, which is the same contract relied on as a defense in this case: It is now ordered and adjudged that article 2 of the act of the General Assembly entitled, "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17th, 1886 (General Statutes, chap. 92, art. 2), and the acceptance of the provisions thereof by the defendant constituted a contract between the defendant and the Commonwealth, which the latter cannot alter or change without the consent of the former; by the terms of which contract the defendant cannot, during

the continuance of its charter, be assessed for taxation or taxed for State purposes in a different mode or at a greater rate of taxation than as provided for in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon any real estate it may own; that the provisions of the present constitution of this State and of the act of November 11th, 1892 (art. 3, chap. 103, Acts 1891–'2–'3), in so far as they were intended to provide for any assessment or taxation of the defendant's property, rights
169 of property or franchise except its said real estate, are in violation of and repugnant to the Federal Constitution and void; that the board of valuation and assessment, provided for in said act of November 11th, 1892, had and has no authority in law to assess or value the defendant's franchise for taxation, or the auditor to apportion or certify the same, or any part of the same, for county or municipal taxation; that the temporary injunction which was prayed for in this cause at the commencement of the action, be, and the same is, now hereby granted, and the defendants be, and each of them *are* perpetually enjoined and restrained from levying upon or selling any property of the defendant for the purpose of collecting any taxes for the city of Frankfort upon the franchise or property of the defendant, except upon its real estate; and it is further adjudged that the defendant recover of the plaintiff its costs in this action expended. To all which the Board of Councilmen of the City of Frankfort except, and pray an appeal to the court of appeals, which is granted.

Clerk's Certificate.

Franklin County Court.

I, Thos. B. Ford, clerk of the said court, do certify that the foregoing 18 pages contain a true, perfect and complete transcript of all the pleadings, orders and proceedings, in the case mentioned therein, taken from the records of my said office.

Witness my hand, as clerk aforesaid, this the 15th day of May, 1897.

THOS. B. FORD,
Clerk Franklin Circuit Court.

Fee $5.00.

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And on the same day, to wit: on May 12th, 1897, the following subpœna in chancery was issued from the clerk's office of the United States circuit court for the district of Kentucky, at Frankfort, upon the filing therein of the foregoing bill of complaint, viz:

Subpœna.

The United States of America to the marshal of the Kentucky district, Greeting:

You are hereby commanded to summon Samuel H. Stone, G. W. Long, Charles Finley, County of Franklin and the Board of Councilmen of the City of Frankfort, to appear before our circuit court of the United States of America, of the district of Kentucky, at the Federal Court hall, in the city of Frankfort, on the first Monday in June next, to answer a bill in equity exhibited against them in our said court by Deposit Bank of Frankfort, and this they shall in nowise omit, under the penalty of four hundred dollars, and have then there this writ.

171 In testimony whereof, Melville W. Fuller, Esq., Chief Justice of the Supreme Court of the United States of America, hath caused the seal of our said court to be hereunto affixed, at the clerk's office of said court in Frankfort, this 12th day of May, A. D. 1897, and in the 121st year of our Independence.

Attest:

W. G. CHAPMAN,
C. C. C., K. D.,
By CHAS. N. WIARD, *Deputy.*

MEMORANDUM.—The said defendants are required to enter their appearance in the clerk's office of said court, on or before the first Monday in June, 1897, otherwise the said bill will be taken *pro confesso.*

W. G. CHAPMAN, *Clerk,*
By CHAS. N. WIARD, *D. C.*

And on a day following, to wit: on the 17th day of May, 1897, said subpœna in chancery was returned and filed with the following return endorsed thereon, viz:

Marshal's Return.

Executed on Samuel H. Stone, G. W. Long, Chas. Finley, by delivering to each of them a copy of the within. Executed on County of Franklin by delivering a copy of the within to Ben Williams, county judge. Executed on Board of Councilmen of City of Frankfort by delivering a copy of the within to Ira Julian, mayor of city of Frankfort, all of Frankfort, Ky., this May 15, 1897.

JAMES BLACKBURN, *Marshal,*
Per L J. DUDLEY, *D. M.*

Fees, $10.

172 And on a day following, to wit: on May 28th, 1897, the following notice of motion for interlocutory injunction was filed herein, viz:

Notice of Motion for Interlocutory Injunction.

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

DEPOSIT BANK OF FRANKFORT, Complainant,
versus
SAMUEL H. STONE, &c., Defendants.

The defendants, City of Frankfort and The County of Franklin, will take notice that the complainant in the above-entitled cause will on Friday, May 28, 1897, at the Federal court-room in Nashville, Tennessee, about the hour of 10 a. m., or when the court shall convene, move the court to grant an interlocutory injunction against you from proceeding to collect any taxes upon any valuation by the board of valuation and assessment, for the years mentioned in the bill of complaint; said injunction to restrain you pending this suit and until a final decree can be had; and to be in such terms as the court may direct.

FRANK CHINN,
Counsel for Complainant.

Service of above notice is hereby accepted, May 18, 1897.

IRA JULIAN, *Mayor.*
IRA JULIAN,
Attorney for Franklin County.
B. G. WILLIAMS,
County Judge of Franklin Co.

173 And on the same day, to wit: on May 28th, 1897, the following plea was filed herein by the Board of Councilmen of the City of Frankfort and the County of Franklin, viz:

Plea of City of Frankfort and County of Franklin.

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

DEPOSIT BANK OF FRANKFORT
against
SAMUEL H. STONE, G. W. LONG, CHARLES FINLEY, COUNTY OF Franklin, and The Board of Councilmen of the City of Frankfort.

The plea of the above-named Board of Councilmen of the City of Frankfort and County of Franklin, defendants, to the bill of complaint of the above-named Deposit Bank of Frankfort, complainant.

These defendants (Board of Councilmen of the City of Frankfort and Franklin County), by protestation, not confessing or acknowledging all or any of the matters or things in said bill of complaint to be true in such manner and form as the same are therein set forth and alleged, do plead thereto and for plea say: That this court has no jurisdiction of the matters or things set forth and alleged in the said bill; and humbly crave the judgment of the honorable court whether or not they ought to be compelled to make any further or other answer to the bill.

JAS. H. POLSGROVE,
County Attorney, Franklin County.
IRA AND W. H. JULIAN,
For Defendants Board of Councilmen of the City of Frankfort and Franklin County.

174 And on the same day, to wit, on May 28th, 1897, the following demurrer was filed herein by the Board of Councilmen of the City of Frankfort and the County of Franklin, viz:

Demurrer of City of Frankfort and County of Franklin.

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

DEPOSIT BANK OF FRANKFORT
against
SAMUEL H. STONE, BOARD OF COUNCILMEN OF THE City of Frankfort, County of Franklin, and Others. } In Equity.

The demurrer of the above-named Board of Councilmen of the City of Frankfort and County of Franklin, defendants, to the bill of complaint of the above-named Deposit Bank of Frankfort, complainant.

These defendants, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint

contained, to be true in such manner and form as the same are therein set forth and alleged, doth demur to the said bill, and for cause of demurrer showeth:

That it appeareth by the complainant's own showing by the said bill, that it is not entitled to the relief prayed for by the bill against these defendants.

Wherefore, and for divers other good causes of demurrer appearing on the said bill, these defendants doth demur thereto; and pray the judgment of this honorable court, whether or not they shall be compelled to make any answer to the said bill, and they
175 humbly pray to be hence dismissed with their reasonable cost in this behalf sustained.

JAS. H. POLSGROVE,
County Attorney, Franklin County,
IRA AND W. H. JULIAN,
For Defendants Board of Councilmen of the City of Frankfort and Franklin County.

I hereby certify that the foregoing points in my opinion are well taken, and sustained by the law.

IRA JULIAN,
Mayor of the City of Frankfort.

And on the same day, to wit: on May 28th, 1897, the following demurrer was filed herein by the defendants Stone, Finley and Long, viz:

Demurrer of Stone, Auditor, &c., et al.

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

DEPOSIT BANK OF FRANKFORT, Complainant,
versus
SAMUEL H. STONE, ETC., Defendants. } No. 275.

The demurrer of the defendants Samuel H. Stone, auditor; Charles Finley, secretary of state, and George W. Long, treasurer of the State of Kentucky, to the bill of complaint of Deposit Bank of Frankfort, complainant.

These defendants, by protestation, not confessing any or all of the matters and things in the complainant's bill of complaint
176 contained to be true, in such manner and form as the same *is* therein set forth and alleged, demur to said bill, and for cause of demurrer state:

1. That the said bill fails to state facts sufficient to show jurisdiction in this court.

2. That the said bill does not contain any matter of equity whereon this court can ground any decree, or give to the complainant any relief against these defendants.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, these defendants demur thereto, and humbly demand the judgment of this court whether they shall be compelled to make any further or other answer to the said bill, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

W. S. TAYLOR,
Attorney General of the State of Ky.

I hereby certify, as counsel for the defendants Samuel H. Stone, auditor; Charles Finley, secretary of state, and George W. Long, treasurer of the State of Kentucky, in the foregoing demurrer, that, in my opinion, the same is well founded in point of law and proper to be filed.

W. S. TAYLOR,
Attorney General of the State of Kentucky.

And on the same day, to wit: on May 28th, 1897, the following answer was filed herein by the Board of Councilmen of the City of Frankfort and the County of Franklin, viz:

177 *Answer of City of Frankfort and County of Franklin.*

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

DEPOSIT BANK OF FRANKFORT
versus
SAMUEL H. STONE, BOARD OF COUNCILMEN OF THE City of Frankfort, The County of Franklin, and Others. } In Equity.

Answer of the above-named Board of Councilmen of the City of Frankfort and County of Franklin, defendants, to the bill of complaint of the above-named Deposit Bank of Frankfort.

In answer to the said bill, without waiving demurrer (plea) to the jurisdiction or the general demurrer to the bill, but reiterating and relying upon the same, the Board of Councilmen of the City of Frankfort and the County of Franklin say, as follows:

'Tis true that, by the settled course of the decisions of the court of appeals of Kentucky, the meaning of the provisions of complainant's charter as to taxation, have been fixed and determined; but not as indicated by complainant's bill herein.

It has been by said decisions fixed and determined that the complainant's charter as to taxation is not and was never an irrevocable contract. The only decision ever rendered by the Kentucky court of appeals, construing the said Deposit bank's charter exemption from taxation is that written and delivered by Judge Bennett, of date June 5, 1888, in case of Commonwealth and Franklin
178 County *v.* Deposit Bank of Frankfort, referred to in the bill. That decision held that the charter of the Deposit Bank of

Frankfort never at any time constituted an irrevocable contract, and that the property of said bank could be taxed according to the legislative will (subject only to the State constitution).

Opinions of the same court, in numerous other cases, by necessary implication, are to the same effect.

The charter of the said deposit bank, having been originally granted in 1863, for the period of twenty years, same was renewed by act of February 23, 1882, which renewing act *provides* "that the legislature retains the right to alter, amend or repeal the charter and all amendments thereto of said bank." (See Acts 1881–'2, vol. 1, p. 495.)

'Tis under and by virtue of this renewing act that the said deposit bank now exists and has existed ever since 1883.

As to the judgment of the Franklin circuit court, entered on February 1, 1896, in case of Deposit Bank of Frankfort *v.* Franklin County, &c., set out in the bill, same is erroneous; an appeal therefrom was prayed and granted and the appeal will be duly prosecuted.

As to judgment of the Franklin circuit court, entered on February 1, 1896, in case of Board of Councilmen of the City of Frankfort *v.* Deposit Bank of Frankfort, set out in the bill, same is erroneous; an appeal therefrom was prayed and granted, and the appeal will be duly prosecuted. This last-named case has never been before the Kentucky court of appeals, and these defendants deny
179 that they or either of them ever agreed that same should be determined or affected by the decision of any other case or cases.

The recital in said judgment, as to any such agreement, is unfounded, is unsupported by either pleading or evidence, and was entered without knowledge or consent of these defendants, or either — them.

These defendants deny that it has ever been fully or finally or at all adjudicated, that complainant is protected by contract from taxation under local levies imposed by these defendants or either of them. These defendants deny that it has ever been fully, or finally or at all adjudicated, that article two (2) of the Hewitt bill ever constituted an irrevocable contract between the State of Kentucky and the complainant, Deposit Bank.

These defendants deny that Samuel H. Stone, Charles Finley, and George W. Long are threatening to or will value the franchise of complainant, or are threatening to or will certify the valuation of said franchise to any county clerk, otherwise than in accordance with the revenue act of November 11, 1892 (cited in the bill herein), as construed by the court of last resort of the State. These defendants deny that said valuation and certification would be illegal, or violative of any contract between complainant and the State, or would cast a cloud upon complainant's franchise, or would cause a multiplicity of suits to be brought against complainant, or would damage complainant in a way that could not be repaired or estimated at common law. These defendants deny that complainant has

no remedy at law for the wrongs complained of. Under the
180 laws of Kentucky, complainant may pay the taxes in controversy under protest, and afterwards, in a single suit at law, have its rights adjudicated and enforced. These defendants allege that each of these defendants is solvent and amply able to reimburse complainant for any loss it may, in any event sustain, by reason of the wrongs alleged in the bill.

These defendants deny that they, or either of them, will collect or attempt to collect of complainant, any tax otherwise than in accordance with the said revenue law of 1892, as construed by the court of last resort of the State, or will subject complainant to the harassment of many suits, or will cast a cloud over its franchise of property, or will attempt to enforce any penalty against complainant otherwise than as provided by law.

These defendants allege that, to grant the injunction prayed for would be (in effect) to enjoin the State of Kentucky, through her officers, from executing the State constitution and the present revenue law of the State, as construed by the court of last resort of the State.

These defendants allege that, to grant the injunction prayed for would be (in effect and in fact) to enjoin proceedings in the State courts for collection of the taxes in controversy, contrary to section 720 of the Revised Statutes of the United States. The laws of Kentucky authorize the collection of taxes by suit in the circuit and county courts of the State. There is now pending in the Franklin circuit court, at Frankfort, Ky., a suit by these defendants against complainant, for mandamus to compel the State board of
181 assessment to value and apportion complainant's franchise, and the auditor (Samuel H. Stone) to certify the valuation and apportionment thereof to the county clerk of Franklin county, in order to — collection of the taxes now in controversy herein between these defendants and complainant.

Besides, complainant's bill itself sets forth the two cases of Deposit Bank of Frankfort *v.* Franklin County, etc., and Board of Councilmen of the City of Frankfort *v.* Deposit Bank of Frankfort, which are now pending, and will be prosecuted to judgment by the court of appeals of Kentucky and by the Supreme Court of the United States, if the said prosecution be not prevented by the injunction prayed for herein. Each of the said three cases, now pending in the State courts, involves the question of whether or not article two (2) of the Hewitt bill constitutes an irrevocable contract, and consequently involves the right of these defendants to all of the taxes in controversy herein.

These defendants submit that there is no equity in the bill; that the injunction prayed for ought not to be granted, and that this court will not exercise jurisdiction of the cause, and pray that the said bill be dismissed with cost.

JAS. H. POLSGROVE,
County Attorney, Franklin County,
IRA AND W. H. JULIAN,
For Defendants, Board of Councilmen of the City of Frankfort and Franklin County.

And on the same day, to wit: on May 28th, 1897, the following order was made and entered herein, viz:

182 *Order Taking Demurrers under Advisement.*

United States Circuit Court for the Sixth Circuit, District of Kentucky, at Frankfort.

THE DEPOSIT BANK OF FRANKFORT
versus
SAMUEL H. STONE, ETC.

Now this day came the complainant by Frank Chinn, counsel, and filed notices herein duly served, and thereupon moved the court to grant an interlocutory injunction against Samuel H. Stone, Geo. W. Long and Chas. Finley, enjoining and restraining them from making any assessment or valuation of franchises or intangible property of the complainant under the act of November 11, 1892. And against the defendants, The Board of Councilmen of the City of Frankfort and said County of Franklin, from attempting to collect any taxes thereon.

And the said Board of Councilmen of the City of Frankfort and Franklin County appeared by Ira Julian and J. H. Polgroves, counsel, and objected to the said motion. And the same having come on to be heard was argued and submitted, and the court, not being advised, takes time.

And thereupon at the same time came defendants Samuel H. Stone, Geo. W. Long, and Chas. Finley, by W. S. Taylor, attorney general, and filed herein their demurrers to the bill of complaint; and also came the Board of Councilmen of the City of Frankfort and the County of Franklin, by Ira Julian and J. H. Polgroves, and filed herein their demurrers to the said bill of complaint, and by stipulation, without waiving the same, their answers.

183 And the said cause, having come on to be heard upon the said demurrers and argued by counsel, was submitted, and the court, not being advised, takes time.

May 28, 1897.

WM. H. TAFT,
Circuit Judge.

On a day following, to wit: on the 5th day of July, 1897, the following entry was made herein at rules, viz:

Order Filing Replication.

DEPOSIT BANK OF FRANKFORT
vs.
S. H. STONE ET AL.

This day came the complainant, The Depost Bank of Frankfort, by Frank Chinn, Esq., its counsel, and filed its replication to the

joint answer of the Board of Councilmen of the City of Frankfort and Franklin County.

Said replication is in words and figures as follows, viz:

Replication.

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

THE DEPOSIT BANK OF FRANKFORT, Complainant,
vs.
SAMUEL H. STONE, ETC., Defendant-.

Replication of the complainant to the joint answer of the Board of Councilmen of the City of Frankfort and Franklin County.

This repliant, saving and reserving to itself all advantage of exception to the insufficiencies of the answer, for replication thereunto saith that it will aver and prove its said bill to be true,
184 and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all of which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

FRANK CHINN,
Solicitor for Complainant.

And on a day following, to wit: on the 9th day of May, 1898, the following order was made and entered herein, viz:

Temporary Restraining Order.

FARMERS' BANK OF KENTUCKY, Complainant,
vs.
SAMUEL H. STONE, &c., Defendants.

DEPOSIT BANK OF FRANKFORT, Complainant,
vs.
SAMUEL H. STONE, &c., Defendants.

Came this day the complainants in the above-styled causes, wherein Samuel H. Stone is one of the defendants, and filed herein an amended and supplemental bill of complaint, and the complainants in said several cases also filed herein notice, duly served, of the motion to be made this day; and came Samuel H. Stone, Charles Finley and G. W. Long, by Richard Ernst, their attorney, and entered appearance to such motions, and also came the City of
185 Frankfort and Franklin County and objected to the motions made in cases to which these defendants are parties, and, the

court being advised, it is now ordered, adjudged, and decreed that the several defendants in the above-styled cases are enjoined and restrained as follows: The defendants Stone, Finley and Long are enjoined and restrained from making or certifying any assessment against the complainants or any of them for the years 1895, 1896, 1897 or 1898, or any of them.

This order is only to stand until Saturday, June 4th, 1898, when the court will announce its decision on pending questions; to all of which defendants excepted.

(Signed) WM. H. TAFT,
Circuit Judge.

Said supplemental bill filed herein on May 9th, 1898, was and is in words and figures as follows, viz:

No. 275. *Supplemental Bill.*

Circuit Court of the United States, Sixth Circuit and District of Kentucky.

DEPOSIT BANK OF FRANKFORT, Complainant, *vs.* S. H. STONE ET AL., Defendants. } No. 275. Supplemental Bill.

The Deposit Bank of Frankfort for supplemental bill herein and reiterating all the averments in its original bill of complaint contained to have the same effect as if set out in full herein, and relying upon the same, alleges that the defendants Sam'l H. Stone, Charles Finley, and George W. Long, are threatening and, un-
186 less restrained by this honorable court, will proceed to value the franchise of the complainant under the act of November, 1892, for the year 1898, and will certify such value to the county clerk of Franklin county, to be by him certified to the collecting officer of the board of councilmen of the city of Frankfort and the collecting officer of the county of Franklin; that such valuation, certification, and assessment thereunder will be illegal and in violation of the complainant's contract in the original bill of complaint set out, and unless restrained by this honorable court the defendant-County of Franklin and Board of Councilmen of the City of Frankfort will attempt to levy and collect taxes based upon the apportionment of valuation found by the said board of valuation and assessment for the year 1898, in addition to the years 1894, 1895, 1896 and 1897, described in the said bill of complaint.

The premises considered, the complainant prays that the said Samuel H. Stone, Charles Finley, and George W. Long, be perpetually enjoined and restrained from assessing the value of the complainant's capital stock for the year 1898, or for any other year, and that the defendants Samuel H. Stone be enjoined fro*n any* certifying such value to the said county and board of councilmen, and that the said county and board of councilmen of the city of Frank-

fort be enjoined and restrained from endeavoring to collect any taxes upon such valuation for the year 1898; and it prays as in its original bill and for all proper relief.

FRANK CHINN,
Solicitor for Complainant.

187 Affiant B. —. Milam says he is president of the complainant, Deposit Bank of Frankfort; that the facts stated in the foregoing supplemental bill, in so far as stated from his personal knowledge, are true, and so far as stated from information, he believes them to be true.

BENJ. C. MILAM.

Subscribed and sworn to before me this 7th day of May, 1898, by Benjamin Milam.

W. G. CHAPMAN,
Cl'k U. S. Cir. Ct.

Said notice of motion filed herein on May 9th, 1898, is in words and figures as follows, viz:

Notice of Motion to File Supplemental Bill.

Circuit Court of the United States, Sixth Circuit and District of Kentucky.

DEPOSIT BANK OF FRANKFORT, Complainant,
vs.
S. H. STONE ET AL., Defendants. } No. 275. Notice.

The defendants to the above-entitled bill of complaint will take notice that on Monday, May 9th, 1898, the complainant will move, before the Honorable W. H. Taft, circuit judge, at his chambers or court-room, in the Federal building, at Cincinnati, Ohio, about the hour of two p. m., to file herein an amended and supplemental bill of complaint, and for an order of injunction or restraint against the defendants in accordance therewith.

Respectfully, DEPOSIT BANK OF FRANKFORT,
By FRANK CHINN, *Its Solicitor.*

188 Service of above notice is accepted May 7th, 1898.

IRA AND W. H. JULIAN,
Att'y- for Franklin County and City of Frankfort.
W. S. TAYLOR,
Attorney General of Kentucky.

On a day following, to wit: on the 25th day of June, 1898, the following order was made and entered herein, viz:

Decree.

DEPOSIT BANK OF FRANKFORT
vs.
SAMUEL H. STONE ET AL.

The court being sufficiently advised, files its opinion herein.

It is therefore adjudged, ordered and decreed as follows:

First. That the demurrer of the defendants Board of Councilmen of the City of Frankfort and Franklin County and of the defendants Samuel H. Stone, G. W. Long, and Charles Finley be, and the said demurrers are hereby, overruled; to which the said defendants each except.

Second. The plea of defendants Board of Councilmen of the City of Frankfort and Franklin County to the bill of complaint is overruled; to which the said defendants except.

Third. Thereupon came the complainant, by Frank Chinn, its counsel, and files its replication to the answer of the defendants Board of Councilmen of the City of Frankfort and Franklin County.

The defendants County of Franklin and City of Frankfort
189 offered to file an amended answer; to which complainant objected, and the motion to file is overruled; to which said defendants except, and said amended answer is made a part of the record by the order.

And by consent this cause came on to be heard for final decree. The complainant read upon hearing its bill of complaint and its amended bill of complaint herein, together with all the exhibits filed with said bills, to wit:

Exhibit "A," being the record of the proceedings in the case of Deposit Bank of Frankfort against Franklin County and John W. Gaines, sheriff.

Exhibit "B," being the records in the proceedings in the case of Deposit Bank of Frankfort against Franklin County and R. D. Armstrong, sheriff.

Exhibit "C," being judgment of Franklin circuit court, entered February 1st, 1896, in the suit of Deposit Bank of Frankfort against Franklin County.

Exhibit "D," being record of the proceedings in the case of Board of Councilmen of the City of Frankfort against Deposit Bank of Franklin.

The defendant The County of Franklin read on the hearing its answer, and the defendant Board of Councilmen of the City of Frankfort read on the hearing the record of the proceedings in the case of Board of Councilmen of City of Frankfort against L. C. Norman, auditor, &c., and also read its answer.

And it is now adjudged, ordered, and decreed that the defendants Samuel H. Stone, Charles Finley, and George W. Long, be,
and they are hereby, perpetually enjoined and restrained
190 from proceeding to value the franchise of the complainant under the act of November 11th, 1892, for the years 1895,

1896, 1897, 1898, or for any other subsequent years until the expiration of the charter of the complainant, and are enjoined and restrained from certifying such value to the county clerk of Franklin county or to any officer of the Board of Councilmen of the City of Frankfort or the County of Franklin; and the defendants County of Franklin and Board of Councilmen of the City of Frankfort are enjoined and restrained from endeavoring to collect any tax upon any such valuations; and the complainant, by making payments in accordance with the Hewitt law, is discharged in full from all taxes to be exacted from it under any form or by any authority.

It is further adjudged, ordered, and decreed that by reason of the several pleas of *res adjudicata*, relied on by the complainant in its bill and as shown by the exhibits therewith, the complainant has established a contract with the Commonwealth of Kentucky under the provisions of article 2 of the act of the General Assembly of the State of Kentucky, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17th, 1896, and the acceptance of the same by the complainant, the terms of which contract the commonwealth cannot alter or change without the consent of the complainant; that by the terms of this contract the complainant and its shares of stock cannot, during its corporate existence, be assessed for taxation for State purposes in a different mode or at a greater rate of taxation than as prescribed in said act, and can be assessed for taxation and taxed for county and municipal
191 purposes only upon its real estate used by it in conducting its business; that the provisions of the present constitution of the Commonwealth of Kentucky and the act of November 11th, 1892, in so far as they are intended to provide or do provide for any assessment or taxation of the complainant's property, rights of property, or franchise, or shares of stock, except to the extent and in the manner provided by sections 1, 2 and 3 of article 2 of the said act approved May 17th, 1886, and except to assess and tax for county and municipal purposes upon its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void.

And it is further adjudged that the complainant recover of the defendant its costs in this action expended.

And came defendants and prayed an appeal in open court and tendered their assignment of errors; whereupon the court allowed the appeal, and orders the assignment of errors to be filed and fixes the appeal bond at one thousand dollars.

June 25th, 1898.

(Signed) WM. H. TAFT,
Circuit Judge.

Said opinion filed herein on June 25th, 1898, is in words and figures as follows, viz:

Opinion. No. 6555.

Circuit Court of the United States, District of Kentucky.

PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF Kentucky, Complainant,
vs.
SAMUEL H. STONE, CHARLES FINLEY, G. W. LONG, CITY of Louisville, County of Franklin, and The Board of Councilmen of the City of Frankfort, Defendants. } No. 6555.

Before Harlan, circuit justice, and Taft and Lurton, circuit judges.

192 This is a bill in equity filed by the Bank of Kentucky, a corporation organized under the laws of Kentucky, to restrain the assessment and collection of certain taxes for the benefit of the defendants The City of Louisville, The County of Franklin and The City of Frankfort. Samuel H. Stone is the auditor of public accounts for the State of Kentucky, Charles Finley is the secretary of state, and George W. Long is the State treasurer; and these three officers, also made defendants herein, constitute the State board of valuation and assessment. The bill avers that the complainant has an irrevocable contract with the State of Kentucky, by which taxes are limited to a certain amount per share upon its stock, and the usual taxes on its real estate, but that the revenue act of the legislature of Kentucky passed November 11, 1892, impairs that contract and is in violation of the Constitution of the United States.

The case made by the bill is as follows:

The complainant was created a body politic and corporate by an act of the General Assembly of Kentucky approved February 2, 1834. The term of its corporate existence was fixed at thirty years from the date of its incorporation. It was authorized to do a banking business and to issue bank notes; it was directed to keep its principal office of discount and deposit in the city of Louisville and to locate a branch at Frankfort, the seat of the government, to aid and manage the fiscal affairs of the State. The State was given a voice in the control of the bank by a provision that the government of the Commonwealth should appoint three of the bank's directors.

193 By the fifteenth section of the original charter, it was provided that the bank should pay to the treasurer of the Commonwealth twenty-five cents on each one hundred dollars of stock held and paid for in said bank, which should be in full of all tax and bonus, provided that the legislature might increase or diminish the same; but that at no time should the tax exceed fifty cents on each one hundred dollars of stock paid for in said bank. By an act of February 12, 1836, the tax was increased to fifty cents a share. By the act of February 15, 1858, it was provided that the charter privileges of the complainant should continue in full force for twenty years from October 1, 1864, but this extension was de-

clared to be granted on certain conditions. The extension was duly accepted by complainants.

On March 18, 1886, an act called the Hewitt act was passed to make taxation equal and uniform. It provided that all State and national banks should pay into the State treasury seventy-five cents on each share of their capital stock and should in addition, pay into said treasury on their surplus, undivided profit and accumulations in excess of 10 per cent. of their capital stock, a tax at the same rate as that assessed on real property; and that the said taxation should be in full of all tax—State, county and municipal—except that the real estate and buildings, owned and used by the banks in conducting their business should not be exempted from taxation for municipal or county purposes; and that such real estate alone might be taxed for county and municipal purposes, as other real estate was taxed.

194 The fourth section of the act provided that each of the banks, institutions and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders at a regular or called meeting thereof, might give its consent to the levying of said tax, and agree to pay the same and waive and release all right under the act of Congress or under the charters of the State banks, to a different mode or smaller rate of taxation, which consent and agreement to and with the State of Kentucky should be evidenced by writing, under the seal of said bank, and delivered to the governor of the Commonwealth before the next meeting of the legislature; and said agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock should be exempt from all other taxation whatsoever, so long as said taxation should be paid, during the corporate existence of the bank.

On June 25, 1887, within the proper time, at a stockholders' meeting by a vote of the stockholders, the complainants gave their consent to the levying of said tax, and to the waiver and release of all right under their charter to a different mode and a lower rate of taxation, and this consent was duly certified by the governor of the Commonwealth. Since 1887, the complainants have paid this tax under the so-called Hewitt act.

On November 11, 1892, the legislature of Kentucky, under a constitution adopted in 1891, passed an act dealing with the assessment of certain corporations, among others, banks. The act provided

195 that every incorporated bank should, in addition to other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town or taxing district where its franchise might be exercised. The auditor, treasurer and secretary of state are by said act constituted a board of valuation and assessment for fixing the value of said franchise. The board is required to apportion the value of the franchise among the several taxing jurisdictions entitled to a share of such tax, and for such apportionment the auditor of State is required, at the expiration of thirty days, to certify to the county clerks of the counties where any portion of the corporate

franchise of such banks shall be liable to local taxation the amount thereof liable for county or State taxes; and the county clerk is required to certify the same to the collecting officer of the county and city for collection. If a bank fails to pay its taxes, penalties and interest after thirty days' notice, it is to be deemed guilty of a misdemeandor, and upon conviction is to be fined $50 for each day during which the tax remains unpaid—to be recovered by indictment or by civil action—of which the Franklin circuit court shall have jurisdiction. The bill avers that the amount of tax which the complainant would have to pay to the board of valuation and assessment over and above what it has to pay under the Hewitt law would be more than $20,000 per annum.

The compiainant avers that the defendants are conclusively estopped by previous litigation to contend in this suit that the complainant has not an irrevocable contract with the State limiting its taxes to those fixed in the Hewitt act; that on February 28, 1894,
196 the complainant filed in the circuit court of Franklin county, that being a court of general jurisdiction, its petition against the County Court of Franklin and R. D. Armstrong, sheriff of said county, setting forth the contracts between complainant and the State in regard to taxes under its original charter, and under the Hewittt law, claiming that no taxes could be collected from the complainant except under the Hewitt law during its charter life, and further that the act of the legislature of November 11, 1892, was unconstitutional and void as impairing the obligation of its contracts aforesaid; that the prayer of the petition was that the court should establish the contracts and should enjoin Franklin County and Armstrong, its sheriff, from attempting to collect any taxes contrary to said contracts; that a decree was entered upon this petition in the Franklin circuit court, adjudging that the act of November 11, 1892, did not violate any contract between the complainant and the State, and the petition for injunction was denied; that the complainant thereupon appealed from the decree to the court of appeals of Kentucky, which court reversed the judgment of the lower court and remanded it to the circuit court of Franklin county for judgment in conformity to its opinion; that the circuit court entered the following judgment on January 21, 1896, which is still in full force and effect:

"This day came the parties by their attorneys, and this cause having been heretofore submitted for a judgment conforming to the opinion and mandate of the court of appeals heretofore filed, reversing the former judgment of this court, and the court being now sufficiently advised, it is adjudged that article 2 of the
197 act of the General Assembly, entitled 'An act to amend the revenue laws of the Commonwealth of Kentucky,' approved May 17, 1886 (General Statutes, chapter 92, article 2), and the acceptance of the provisions thereof by the plaintiff, constituted a contract between the plaintiff and the Commonwealth, which the latter cannot alter or change without the consent of the former; by the terms of which contract the plaintiff cannot, during the continuance of its charter, be assessed for taxation or taxed for State pur-

poses in a different mode or at a greater rate of taxation than as prescribed in the said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present constitution of this State and of the act of November 11, 1892 (article 3, chapter 103, Acts 1891-'2-'3), in so far as they were intended to provide for any assessment or taxation of the plaintiff's property, rights of property or franchise, except to assess and tax for county and municipal purposes its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void; that the board of valuation and assessment provided for in said act of November 11, 1892, had and has no authority in law to assess or value the plaintiff's franchise for taxation, or the auditor to apportion or certify the same, or any part of the same, for county or municipal taxation; that the temporary injunction which was granted in this cause at the commencement of the action be, and the same is now, made perpetual,
198 and the defendants, Franklin County and R. D. Armstrong, sheriff of said county, be, and each of them *are*, perpetually enjoined and restrained from levying upon or selling any property of the plaintiff, or in any manner collecting from the plaintiff any taxes for the purposes of Franklin county upon the franchise or property of the plaintiff, except taxes upon its real estate in conducting its business. And it is further adjudged that the plaintiff recover of the defendant its costs in this action expended."

That a similar suit was filed in the same court by the complainant against the Board of Councilmen of the City of Frankfort to enjoin it from attempting to collect municipal taxes on the apportioned valuation of the franchise certified to the city by the board of valuation and assessment, setting forth exactly the same objection to the validity of the tax; that the court entered a decree for the defendants, and an appeal was taken to the court of appeals, which reversed the decree of the circuit court and directed that a new decree be entered in conformity with the opinion transmitted; that thereupon the Franklin circuit court entered a judgment enjoining the city of Frankfort in exactly the same terms as that already set forth above in the case against the county court of Franklin; that in February, 1894, the city of Louisville, claiming to act under authority given it by an act of the Kentucky legislature affecting the government of cities of the first class, of which the city of Louisville was the only one, passed an ordinance requiring the banks of the city of
199 Louisville to pay to the city an annual tax of 4 per cent. upon their annual gross earnings; that the complainant failed to pay the tax and thereupon, under the act referred to, a warrant was sued out in a criminal prosecution against the complainant in the city court of Louisville; that the complainant then, in the manner provided by law, filed its petition in the Jefferson circuit court for a writ of prohibition against R. H. Thompson, judge of the police court of the city of Louisville, setting out in apt terms its incorporation, its original charter, the extensions thereof, the passage of the Hewitt law, the contract entered into in conformity therewith, and

claiming the benefit of its said contractual relations with the State; that the petition alleged that the said ordinance of the city of Louisville was void because impairing the obligation of the complainant's contract, and any authority given to the city of Louisville to pass such ordinance was likewise void for the same reason, and prayed that the judge might be prohibited from taking jurisdiction of the proceeding against the complainant for a violation of the ordinance; that issue was joined on this petition by the defendant, The Judge of the Police Court of the City of Louisville; that The City of Louisville, though not a party in name, in that court, was, in reality, the party defendant and appeared by counsel; that the court found the issues in favor of the complainant, entered a judgment accordingly, and, thereupon, the defendant, The City of Louisville, caused an appeal to be taken in its name from the judgment to the court of appeals of Kentucky, in which court the cause was argued by counsel for the City of Louisville and for the Common-
200 wealth of Kentucky; that the court of appeals affirmed the judgment of the Jefferson county circuit court, and sent a mandate of affirmance to the court of original jurisdiction, where it was duly entered; that the averment of the petition in that case upon which issue was joined and which presented the only point for adjudication was as follows:

"The plaintiff states that the said act granting a charter to cities of the first class, and the said ordinance passed in pursuance thereof, are both unconstitutional and void, in that they impair the obligation of the contract between the plaintiff and the Commonwealth of Kentucky, as embodied in its charter as aforesaid, and as embodied in its agreement as aforesaid, made under the revenue law of May 17, 1886, and are a violation of the Constitution of the United States, and especially the section thereof, providing that no State shall pass any law impairing the obligation of a contract.

The plaintiff avers and submits that the said act chartering cities of the first class, and the said ordinance aforesaid, are both unconstitutional and void, as above set forth; that the granting and acceptance of its charter, and the several acts extending and continuing the same, which were accepted and acted upon by said bank, constituted a contract between the State on the one part and the bank and its stockholders on the other part, continuing during the legal existence of the corporation and the State, never had, and has not now, the right to repeal or annul said agreement or the rights conferred by said charter, limiting the right of the State to
201 impose a tax on said bank without the consent of said bank.

The plaintiff further states that it did give its consent to said act of May 17, 1886, and did, upon the considerations therein recited, waive and release its right under its charter to a different mode or a smaller rate of taxation than is therein provided. Said consent and waiver was made on the belief that the said act was intended to put in operation a permanent legislative policy governing the taxation of all banks then existing, which would accept its provisions, to endure at least during the corporate existence of all said assenting banks. The plaintiff submits that such is the true

construction of said act, and that said act and its acceptance constituted a contract which the State cannot annul or repeal, and which is binding on the State in all its departments."

That the petition was demurred to, the demurrer was overruled, and judgment given for plaintiff, and the police judge was prohibited from proceeding with the criminal prosecution against complainant.

The suits of the Bank of Kentucky against the Franklin County Court, against the Board of Councilmen of the City of Frankfort, and against the Judge of the Police Court of the City of Louisville, were argued and heard at the same time by the court of appeals of Kentucky, and were decided by that court in one opinion, filed June 1, 1895, and reported as the Bank-tax cases, 97 Ky. Rep., 590. A
majority of the court of appeals held that the complainants
202 here had an irrevocable contract with the State, and all its agencies, by virtue of its charter and the extensions thereof, and its due acceptance of the provisions of the Hewitt act and that the act of 1892 impaired the obligation of that contract in violation of the Constitution of the United States, and was, therefore, null and void.

The 19th clause of the bill in the case at bar is as follows:

"The complainant says that the defendants, Samuel H. Stone, Charles Finley and George W. Long, are threatening and unless restrained by this honorable court will proceed to value the franchise of the complainant in the manner set forth under the act of November 11, 1892, for the years 1895, 1896 and 1897 and certify such value to the county clerk of Jefferson county, to be by him certified to the collecting officer of the city of Louisville and to the county clerk of Franklin county, to be by him certified to the collecting officer of the board of councilmen of the city of Frankfort and the collecting officer of the county of Franklin; that such assessments will be illegal; in violation of the complainant's contract, as has been heretofore in causes between the complainant and the said several defendants adjudged and will be unlawful and violative of complainant's contract, and will cast a cloud over complainant's franchise; cause a multiplicity of suits to be brought against complainant and damage it in a way that cannot be repaired or
estimated at common law; and from these threatened wrongs
203 the complainant has no remedy at common law, but its only remedy is by a bill in equity; and unless restrained by this honorable court, the defendants, The City of Louisville, The County of Franklin and The Board of Councilmen of the City of Frankfort, will attempt to levy and collect taxes based upon the apportionment of the valuation found by said board of valuation and assessment, and will subject the complainant to the embarrassment of many suits, and cast a cloud upon its franchises and property and an effort will be made to enforce penalties against this complainant, as hereinbefore set out."

It further appears that after the decision in the Bank-tax cases, 97 Ky., 590, the personnel of the court of appeals changed somewhat, and when a new series of bank-tax cases, presenting the same question, came to that court, a different conclusion was reached. A

majority of the court overruled the prior decision, rendered in 1895, and held that the banks, by accepting the provisions of the Hewitt act, did not acquire any contract rights with the State with reference to the mode or right of taxation and that the act of November 11th, 1892, was valid. Deposit Bank *v.* Daviess County, 39 S. W. R., 1030.

The defendants, The Franklin County Court, and The Board of Councilmen of the City of Frankfort, have filed a general demurrer to the bill. The defendants, Stone, Finley and Long, and The City of Louisville, have filed a demurrer, first, to the jurisdiction, and second, for want of equity. By stipulation of counsel for the
204 complainant, defendants were also permitted to file answers without waiving demurrer. The only averment of the answer that is material, is as follows:

"These defendants allege that to grant the injunction prayed for would be (in effect) to enjoin the State of Kentucky, through her officers, from executing the State constitution and the present revenue law of the State as construed by the court of last resort of the State. These defendants allege that to grant the injunction prayed for would be (in effect and in fact) to enjoin all proceedings in the State courts for collection of the taxes in controversy, contrary to section 720 of the Revised Statutes of the United States. The laws of Kentucky authorize the collection of taxes by suit in the circuit and county courts of the State. There is now pending in the Franklin circuit court, at Frankfort, Ky., a suit by these defendants against complainant and others for mandamus to compel the State board of assessment to value and apportion complainant's franchise and the auditor to certify the valuation and apportionment thereof to the county clerk of Franklin county, in order to collection of the taxes now in controversy herein between these defendants and the complainant."

The cause came on for hearing upon the demurrer to the bill, and upon a motion for a preliminary injunction.

TAFT, circuit judge, delivered the opinion of the court.

The bill attacks the validity of the Kentucky revenue law
205 of November, 1892, and seeks relief against its enforcement on the ground that in its application to the complainant bank, it violates that clause of the Federal Constitution which forbids a State to pass a law impairing the obligation of a contract. The case is, therefore, one arising under the Constitution of the United States and as it involves more than $2,000 it is within the jurisdiction of this court. Do the facts stated in the bill bring it within the equity jurisdiction of the court? It is well settled that in the Federal courts an action in equity will not lie to restrain the collection of a tax on the sole ground that it is illegal and void and independently of every other consideration. See Rich *v.* Braxton, 158 U. S., 375, 405. It must appear from the special circumstances averred that there is no adequate remedy at law and that there is some recognized ground for equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits

or produce irreparable injury. Ogden City *v.* Armstrong, 168 U. S., 224, 236; Pacific Express Co. *v.* Seibert, 142 U. S., 339; Allen *v.* Pullman's Palace Car Co., 139 U. S., 658, 661; Shelton *v.* Platt, 139 U. S. 591; Union Pacific R'y Co. *v.* Cheyenne, 113 U. S., 516, 525; Hannewinkle *v.* Georgetown, 15 Wall., 547; Dows *v.* Chicago, 11 Wall., 108. What are the remedies at law which the complainant has? If the collecting officers proceed to collect the tax by distraint, the bank may under the duress of the threatened trespass, pay the taxes alleged to be illegal and then sue the City of Louisville, the County of Frank*fort*, and the City of Frankfort to recover them back. Railroad Company *v.* Commissioners, 98 U. S. 541. It is to be observed, however,
206 that no such action will lie except upon payment under duress. The bank could not simply pay under protest and sue to recover back. Such a payment would be voluntary. There is no statute of Kentucky providing such a remedy as there was in Tennessee in the case of Shelton *v.* Platt. The remedy of paying and suing to recover back in Kentucky exists only when the collecting officer resorts to distraint. But the collecting officers are not obliged to collect the taxes by distraint, they may resort to a simple suit at law for them. In that case, the bank may defend on the ground of the invalidity of the law under which the taxes have been assessed. This remedy, except where the taxes are a cloud upon real estate, would ordinarily be adequate, but under the provisions of the revenue law of Nov., 1892, we do not think it is. By that law the bank on failing to pay the taxes assessed, according to its provisions within thirty days after notice from the collecting officer, is subjected to a penalty of 10 per cent. and to a fine of fifty dollars a day for every day of the delinquency to be enforced by indictment or by civil action. It follows that the remedy of defending a suit at law for taxes under this revenue act is attended with the risk of being compelled to pay fifty dollars a day for every day of the time necessarily consumed in the reasonable litigation of the question of the validity of the tax. By bill in equity, the bank may enjoin the assessment and pending the litigation, however long the delay, no fines or penalties can accrue against the unsuccessful litigant because by the terms of the act they do not begin to accrue until thirty days after notice to pay has been given by the
207 collecting officer. It is manifest that the remedy at law by defending a tax suit in such cases is attended with a great and oppressive burden of risk which is absent in an action in equity. The remedy at law is, therefore entirely inadequate. Smyth *v.* Ames, 169 U. S. 466, 518; Pacific Company *v.* Seibert, 44 Fed. Rep., 315. It is no answer to say that the payment of the tax and the action to recover it back constitutes an adequate remedy because no such action will lie, as already explained, unless there is a distraint, actual or threatened, and the collecting officer by not distraining may wholly deprive the tax-payer of this remedy. Indeed, the counsel for the city of Louisville vigorously contends that the collecting officer in that city has no power to distrain for bank taxes. However this may be, it would seem clear that a court of equity will

not withhold relief from a suitor merely because he may have an adequate remedy at law if his adversary chooses to give it to him. The remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party. To refuse relief in equity, upon the ground that there is a remedy at law, it must appear that the remedy at law is "as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." Boyce *v.* Grundy, 3 Pet., 210, 215; Sullivan *v.* Portland, etc., R. R. Co., 94 U. S., 806, 811. And the application of the rule depends upon the circumstances of each case. Watson *v.* Sutherland, 5 Wall., 74, 79.

The practice of the State courts of Kentucky in issuing injunctions against the collection of taxes cannot, of course, be a controlling consideration in determining the limits of the equity
208 jurisdiction in the Federal courts in such cases; for it is settled that if a case "in its essence be one cognizable in equity, the plaintiff—the required value being in dispute—may invoke the equity powers of the proper circuit court of the United States whenever jurisdiction attaches by reason of diverse citizenship or upon any other ground of Federal jurisdiction." Smyth *v.* D. Ames, 169 U. S., 466, 516. But it is worthy of note that the court of appeals of Kentucky has held that in the absence of a statute allowing an action to recover back from the State taxes illegally collected, the remedy by injunction is the only adequate one. In Gates *v.* Barnett, 79 Ky., 295, 296, the court, in a suit to enjoin a distraint upon certain tobacco for the collection of taxes, said:

"The right to have an injunction to restrain the collection of an illegal tax has been so long recognized and acted upon in this State that it is unnecessary to stop to inquire upon what ground that jurisdiction is exercised by courts of equity. The jurisdiction in this case, however, may be placed upon the ground of inadequacy of the remedy at law. The officer acting in good faith and under the color of right is justified by his process, and is not liable as a trespasser; and as a suit would not lie against the State directly, the only complete remedy is by injunction."

It is by no means clear that distraints or threatened distraints against a bank in view of the character of its business may not involve such serious detriment to its business and incidentally
209 to the public, as to justify equitable intervention. In the case of Lenaure County Savings Bank *v.* The City of Adrian, 66 Mich., 273, 276, a levy upon, and seizure of the bank furniture and fixtures was in progress when an injunction was issued.

Mr. Justice Campbell, speaking for the court, said:

"No point was made in the pleadings or on the argument against the jurisdiction of equity in this case. As the bank was not liable to taxation at all on its personal property and the levy was made in such a way as to directly interfere with its business, the case comes within the analogies of the cases represented by Osborn *v.* Bank of U. S., 9 Wheat., 738, from which it cannot be readily distinguished. The court below does not appear to have doubted the jurisdiction, although deciding in favor of defendants on the merits."

In Union Pacific Railway Co. *v.* Cheyenne, 113 U. S., 516, 525, Mr. Justice Bradley said:

"It cannot be denied that bills in equity to restrain the collection of taxes illegally imposed, have been frequently sustained. But it is well settled that there ought to be some equitable ground for relief besides the mere illegality of the tax; for it must be presumed that the law furnishes a remedy for illegal taxation. It often happens, however, that the case is such that the person illegally taxed would suffer irremediable damage or be subject to vexatious litigation, if he were compelled to resort to his legal remedy alone. For example, if the legal remedy consisted only of an action to re-
210 cover back the money after it had been collected by distress and sale of the tax-payer's lands, the loss of his freehold by means of a tax sale would be a mischief hard to be remedied."

The interference with the business of a bank and the injury to its credit caused by a distress against its personal property would seem to be a mischief equally hard to be remedied by a mere suit to recover the money back when thus collected.

If it were necessary we do not think it would be difficult to sustain the jurisdiction here on the ground that it will prevent a multiplicity of suits. The complainant is seeking to enforce a privilege or exemption which it avers has already been established by the decision of the highest court of the State. To how much more litigation is it to be subjected? Can it not have a remedy in equity against future attempts to invade the privileges already decided to belong to it? In Osborn *v.* Bank of United States, 9 Wheat., 738, 742, Chief Justice Marshall said: "The single act of levying the tax in the first instance, is the cause of an action at law; but that affords a remedy only for the single act, and is not equal to the remedy in chancery, which prevents its repetition and protects the privilege." See also Morris Canal and Banking Co. *v.* Jersey City, 1 Beasley, 227; High on Injunction, sec. 530. In addition to the suits for future taxes there is also danger of harrassing suits for fines and penalties which the law permits to be brought for each day's delay in the payment of the taxes after they have been demanded. We have no doubt that if the complainant shows that the act of
211 November, 1892, violates an exemption secured to it by contract it may have equitable relief.

The second question in the case is that raised by the averment of former adjudication. The case of New Orleans *v.* Citizens' Bank, 167 U. S., 371, it is impossible to distinguish from that before us upon the point of *res judicata*. The Citizens' bank, in New Orleans, was excepted from taxation by an act of the legislature of Louisiana, of January 30, 1836. Extension of its charter was granted and accepted and the question was mooted whether the exemption from taxation continued after extension. The bank brought suit in the district court of New Orleans to enjoin the collection of a tax against it, on the ground that it had by legislative contract, exemption from the same. The district court sustained the claim, and enjoined the collection of the tax. A second suit, brought to enjoin another year's taxes, resulted in a similar judgment. Some years later the

city of New Orleans having attempted to collect a tax, for a subsequent year, in violation of the exemption, the bank filed its bill in equity in the circuit court of the United States for the eastern district of Louisiana, to enjoin the officers of the State and the city from proceeding to collect the tax, and set forth the former adjudication as a conclusive estoppel upon the defendants as to the point of the previous litigation, namely, that there was a contract between the State and the bank, forbidding such taxation. The causes of action were not the same in the case brought in the Federal court and the cases adjudged in the State courts, because they involved taxes for different years, but the thing adjudged, to wit: the existence and binding effect of the contract for the exemption
212 from the particular taxation was the same. The Supreme Court of the United States in this case held that the city of New Orleans and the State taxing authorities were conclusively estopped by the judgments in the State courts from asserting any right to collect the tax in violation of the contract adjudged to exist in the prior litigation and held that the contract having been thus established, the bank was entitled to relief from a violation of that contract by any acts of the State officials acting under the authority of State legislation. It had, theretofore, been doubted in some courts whether a judgment in a suit for taxes could be held to be an estoppel against a State or any agency of the State for the collection of taxes in a suit for taxes subsequently accruing, but the question is now definitely settled. Mr. Justice White, in delivering the judgment of the court, in a most elaborate opinion, said:

"The proposition that because a suit for a tax of one year is a different demand from the suit for a tax for another, therefore, *res judicata*, cannot apply, whilst admitting in form the principle of the thing adjudged, in reality substantially denies and destroys it. The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even though there be different demands, when the question upon which the recovery of the second demand depends, has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies. This is the elemental rule, stated in the text books and enforced by many decisions of this court." * * *

213 "It follows, then, that the mere fact that the demand in this case is for a tax for one year, and the demands in the adjudged cases were for taxes for other years, does not prevent the operation of the thing adjudged, if in the prior cases the question of exemption was necessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed."

In the case before us there can be no question, from the statement of facts and an examination of the records in previous cases as set forth therein, that the question which was adjudged in them was the identical question presented in the same way and for the same purpose as in the case at bar, to wit: whether there was a contract between the bank and the State which forbade the imposition of higher

taxes than those imposed under the Hewitt act. It was distinctly adjudged, in behalf of the complainant against Franklin County and the City of Frankfort, by the court of appeals by the decision rendered in 1895, and by a mandate issued from the court to the Franklin circuit court, that such a contract in fact existed and rendered null and void the provisions of the revenue act of November 11th, 1892, under which the defendants now seek to impose taxes upon the complainant.

It is vigorously pressed upon us, however, that the judgment in the prohibition suit cannot be relied upon by the complainant bank to establish the existence of a contract of exemption between it and the city of Louisville, because there is nothing in the record to show that the issue made by the demurrer to the petition in that
214 suit was the existence of such an exemption and its violation. Neither the mandate of the court of appeals nor the judgment of the Jefferson court states the ground for holding the ordinance void. It is said that some thirty days before the decision of the prohibition case by the court of appeals, that court, in Levi *v.* City of Louisville, 97 Ky., 394, held that the city of Louisville had no power under the constitution to substitute a license tax for *ad valorem* tax on personal property, and that this ruling must have led to overruling the demurrer to the petition in the prohibition suit, because it necessarily rendered the license tax upon the banks void. The Levi case was a suit by an owner of real estate to enjoin the collection of an *ad valorem* tax on his land on the ground that the city had not imposed such a tax on personalty, but had substituted therefor a license tax upon it, and so had discriminated in favor of personal property and against realty. The court of appeals held that it was the duty of the city to impose an *ad valorem* tax on personalty, and that it could only impose a license tax on a business in addition to an *ad valorem* tax on property. We confess we cannot see how this decision would have determined the question at issue between the complainant bank and the city of Louisville, in the prohibition suit. There was nothing in the petition for prohibition to show that the license tax was a substitute for an *ad valorem* tax upon the personal property of the bank. There was nothing to show that the city of Louisville had not, under the revenue act of 1892, assessed an *ad valorem* tax on the bank's personalty. The license tax was graduated by a percentage,
215 not of the bank's personal property, but of the bank's gross receipts, and did not, therefore, purport to be a taxation on its personal property. The petition was not, therefore, demurrable under the Levi case. When we further consider that the sole ground stated in the petition for a prohibition was that the license tax was void, because it impaired the bank's contract of exemption and so violated the Constitution of the United States, and we find that this was the sole ground considered by the court of appeals in its opinion, we can have no doubt what was the point adjudged.

The case of New Orleans *v.* The Citizens' Bank, 167 U. S., 371, is relied on to support the contention that a judgment that a license

tax violated the bank's contract of exemption cannot be pleaded as *res judicata* in a case presenting the question whether a franchise tax violates its right of exemption. In the New Orleans case, the language of the exemption was, "The capital of said bank shall be exempt from any tax laid by the State, or by any parish, or body politic under the authority of the State, during the continuance of its charter." It was held that a judgment holding this to be a valid exemption and one which rendered void any attempt to tax its capital or real and personal property used in its business, or to tax its shareholders by imposing an obligation on the bank to pay a tax on its stock for them, did not estop the city and the taxing officers from taxing property held by the bank, but not as capital, or from taxing shares of stock in the hands of the shareholders or from imposing a license tax. This result was reached, as the court points out, because the exemption clause might be entirely valid and inviolable as a contract so as to exempt capital and business
216 property, and yet, under many decisions of the court, might not prevent the taxation of the shares of stock and upon the same principle might not prevent a tax or license upon its business. In the case at bar the situation is very different. The provision of the exemption clause in the Hewitt act is that "*such a bank and its shares of stock* shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such bank." If this exemption clause is irrevocable, it certainly prevents any additional tax upon the property of the bank. That is clear. The former adjudication was that this exemption was irrevocable and prevented the imposition of a tax even in the form of a license tax upon its business. If it prevents a license tax, *a fortiori* does it prevent a direct tax upon its property, tangible and intangible? The tax imposed by the revenue act of 1892 was called a franchise tax, but it has been held, both by the Supreme Court of the United States and of the court of appeals of Kentucky to be in fact nothing but an *ad valorem* property tax. Henderson Bridge Company *v.* Kentucky, 166 U. S., 150; Adams Express Co. *v.* Kentucky, 166 U. S., 171; Henderson Bridge Company *v.* Commonwealth, 99 Ky., 623.

Nor can there be any doubt that the parties to the former adjudications and this litigation are the same. The real parties in interest in this cause among the defendants are Franklin County, the City of Frankfort and the City of Louisville. It is for them that the board of valuation and assessment are about to apportion the estimated value of the franchise and certify it to them for the collection
217 of taxes. The members of the board of valuation are nothing but their agents created under the law for the purpose of assessing this tax. If the parties in interest in whose favor the tax is to be assessed are bound by the prior litigation, certainly the agencies acting for them under the law are equally bound. In this light the board of valuation and assessment is in respect to the former judgments privy to the city of Louisville and county of Franklin and the city of Frankfort. There is no dispute that the county of Franklin and the city of Frankfort were parties to the respective suits pleaded

as former adjudications. The only controversy which is made is whether the city of Louisville was a party to the prohibition suit set forth in the bill. The original litigation was in form a criminal prosecution against the bank for failure to pay a license. That prosecution was in the name of the city of Louisville. The subsequent litigation, however, was in the form of a proceeding in prohibition against the judge of the city court, in which the criminal prosecution had been conducted, on the ground that that court was exceeding its jurisdiction, because proceeding under a void law. To that writ of prohibition, the city of Louisville was *not* formally made a party in the Jefferson circuit court, but the litigation before the Jefferson circuit court was conducted by the city of Louisville. It was the real party in interest. It was against it that the writ of prohibition was really directed, for at its instance and for its benefit the criminal prosecution had been begun. When, therefore, an appeal had been taken from the Jefferson circuit court to the court of appeals, the appellants were The City of Louisville and The
218 Judge of the Police Court. By this means the city of Louisville formally made itself a party to the record and the mandate which went down was as binding upon it as upon the judge of its court. Had it attempted to proceed with the prosecution it might have been attached for contempt. Bacon's Abridgement, Prohibition M. It is urged that the litigation was really a criminal litigation and that a judgment in a criminal case cannot be made the basis of a plea of *res judicata* in a civil action. The original case was criminal in form, but the subsequent litigation by writ of prohibition was civil and *and* the real parties to it were the defendant in the police court and the city of Louisville, in whose interest the suit was prosecuted in that court. It would have been entirely proper to make the city of Louisville a party defendant to the original writ of prohibition. Indeed, some courts would hold that it was a necessary party. Armstrong *v.* Taylor County Court, 15 W. Va., 190; Walton *v.* Greenwood, 60 Me., 356. However this may be, The City of Louisville, admitting its interest, did appear as appellant and so made itself a party to the whole litigation, and was so treated by the court of appeals of Kentucky. As the parties to this litigation are the same as those in the former suits except the board of assessment which is in privity with the other defendants and as the point adjudged is exactly the same, we can see no escape from the conclusion that the defendants here are estopped from asserting that the complainant has not a contract exempting it from any other taxation than that provided in the Hewitt law, and, therefore, that the act of November 11, 1892, is an infringement of that contract and impairs its obligation in violation of the Constitution of the United States.

219 It is suggested that such a conclusion ousts this court from jurisdiction, because it makes the case turn on a question which does not arise under the laws or Constitution of the United States. We cannot assent to this suggestion. The complainant asserts that it has a contract with the Commonwealth in respect to taxation, the obligation of which the city of Louisville, the city of

Frankfort and the county of Franklin, by the enforcement of a subsequent law of the State are seeking to impair. The defendants deny the existence of such a contract, and we must determine whether, as between the parties such a contract exists. It appears that as between the complainant and the defendants, it has been conclusively adjudicated that such a contract exists. This relieves the court from re-examining that question as an original one between the present parties, but it does not free the court from the obligation to enforce the Constitution of the United States, in favor of the complainant by enjoining the enforcement of a law which will impair the obligation of a contract thus conclusively established. The case of New Orleans *v.* Citizens' Bank, 167 U. S., 371, which presented precisely this aspect, was begun in the circuit court of the United States and was carried to the Supreme Court of the United States and the jurisdiction by the circuit court was not even questioned.

It is argued that the Federal courts, in considering the question whether a State law impairs the obligation of a contract, will not accept as conclusive the construction which the supreme court of the State has put upon its constitution or laws in determining the existence of a contract and its violation. This is true and is
220 settled by a long line of authorities. Shelby Co. *v.* Union bank, 161 U. S., 149; Mobile & Ohio R. R. Co. *v.* Tennessee, 153 U. S., 492–'3; Bryan *v.* the Board of Education, 151 U. S., 650; L. & N. R. R. Co. *v.* Palmes, 109 U. S., 256; Douglas *v.* Kentucky, 168 U. S., 488, 502, and cases cited. But the rule has application only where the judgment of the State court is under a direct review or in cases in which the opinion of the State court is cited merely as an authority and a precedent. It has no application to a case in which a prior judgment of the State court between the same parties is pleaded or is offered in evidence in a subsequent suit in a Federal court as *res judicata* binding the parties. The State court is as much bound by the Constitution of the United States as a Federal court and is vested with as complete jurisdiction in causes otherwise within its cognizance to decide between the parties before it whether a statute of the State impairs the obligation of a contract. Robb *v.* Connolly, 111 U. S., 624, 637. Such decision embodied in a judgment unreversed is as binding with respect to the point adjudged as if it had been rendered by the Supreme Court of the United States. The distinction between the right and duty of the Supreme Court to decide for itself the question of contract or no contract without regard to the State decisions, and its obligations to respect the bar of *res judicata* as between the parties, is quite clearly made in Douglas *v.* Kentucky, 168 U. S., 488, 503, although not expressly commented on. In that case, after maintaining in the strongest terms the obligation of the Supreme Court to exercise an independent judgment in determining the existence of a contract and its impairment, and after declining to follow a prior decision of the State
221 court upon the subject, the court considered as a distinct matter the question whether the point had not been formerly adjudicated in a State court between the same parties, and pointed out with much care that the point of the former adjudication was

not the same as that then before the court. The whole discussion would have been wholly unnecessary if, as contended by counsel for defendants, the doctrine of *res judicata* has no application in the Federal courts when the former adjudication is that of a State court upon a question arising under the Federal Constitution.

One other point remains for consideration. The answer pleads that a mandamus proceeding has been instituted in a State court by the City of Frankfort to compel the board of valuation and assessment to certify the apportioned valuation of the franchises of the complainant; that this mandamus proceeding was begun before the action under consideration and is pending, and that the preliminary injunction issued by this court will be in effect an injunction against that proceeding in the State court. We do not think so. It is settled that the pendency of a suit in a State court is no bar to a suit upon the same subject-matter in this court. City of North Muskegon *v.* Clark, 22 U. S. App., 522, and cases therein cited. The injunction which we shall grant may be offered as a defense by the board of valuation and assessment in the court where the mandamus proceeding is pending, just as a judgment rendered in one of two pending suits for the same cause of action may be offered by supplemental pleading in the other. The sufficiency of the defense will be for that court. We do not enjoin any suit at all, by our
222 order; all we do enjoin is the certification of the taxes. That does not require the defendants to disobey an order of any other court or restrain their prosecution of a suit therein.

The demurrer to the bill must therefore be overruled and the preliminary injunction prayed for must issue.

Opinion, No. 6568.

Circuit Court of the United States, District of Kentucky.

BANK OF COMMERCE, Complainant,
vs.
CITY OF LOUISVILLE, Defendant. } No. 6568.

Opinion. No. 6567.

BANK OF COMMERCE, Complainant,
vs.
SAMUEL H. STONE and Others and THE CITY OF Louisville, Defendants. } No. 6567.

Before Harlan, circuit judge, and Taft and Lurton, circuit judges.

Heard on demurrer to the bill and motion for preliminary injunction.

The Bank of Commerce is a State bank of Kentucky, organized under a statute of that State, approved February 10, 1865. It is situated in Louisville, and when the Hewitt act was passed to amend the revenue laws of the Commonwealth of Kentucky, May 17, 1886,

it duly accepted the terms of that act before the meeting of the next legislature of Kentucky. One of the grounds relied upon in the bill was that of *res judicata*. The averments of the bill upon this point were contained in paragraphs 4 and 5 of the bill, as follows:

223 "Paragraph 4. Your orator shows that early in the year 1894, and before the 4th of May, 1894, the defendant, The City of Louisville, claiming to act under the authority of the statute governing cities of the first class, and of its ordinances adopted in pursuance thereof, demanded of your orator, and of every other bank and trust company in the city of Louisville, a tax equal to 4 per cent. of its gross receipts, and this demand being refused, legal proceedings were commenced in the city court of Louisville, in behalf of the city, against all of said banks and trust companies, including your orator. At that date the tax upon the gross receipts of the banks, if enforceable, was payable to the sinking fund of the city of Louisville, and with a view of embarrassing the sinking fund of the city as little as possible, the banks, through their committee, held a meeting with the commissioners of the sinking fund, and it was agreed between the city of Louisville and its sinking fund commissioners upon the one part and the banks and trust companies of the city of Louisville, including your orator, upon the other, that pending the litigation which, by the agreement, was to be inaugurated, and without prejudice to the right of the banks, they would make payments and loans to said sinking fund as follows:

"First. The sinking fund was to accept from each of said banks and trust companies a payment equal to the difference between the amount which the banks and trust companies would have to pay to the State under the present law and the amount which they

224 would be required to pay for State taxes under the provisions of the Hewitt bill. This sum, it was provided, should be an actual payment, and not be repaid under any circumstances, but its payment was not in any manner or to any extent to prejudice the banks or trust companies paying it, or to be taken as a waiver of any legal right which they might have in the premises.

"Second. In addition to making the above payments, the banks and trust companies, save those which were to be selected to test the question involved, should each lend to the sinking fund a sum, which, added to said payment, would equal four per centum of its gross earnings during the year 1893, and the sinking fund would execute for said loans its obligations, agreeing to repay the same with interest at 4 per centum per annum; and, if it should be finally adjudged by the court of last resort that said banks or trust companies were not liable to pay the license fee required by the ordinance aforesaid, but if it should be finally adjudged that they were liable to pay said license fee, then said loan should be taken and deemed as a payment of said license fee, and the obligation to repay same should be void.

"Third. It was agreed that the banks or companies selected to test the questions involved would each lend the sinking fund a sum equal to 4 per centum of the gross earnings for the year 1893, and

would receive therefor the obligations of the sinking fund as above described.

"Fourth. It was further agreed that that arrangement was
225 entered into with the understanding that the banks and companies would institute without delay and diligently prosecute such action as might be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund would not prosecute them, or any of them, for doing business without license.

"The substance of this agreement was spread at large upon the records of the sinking fund, and a copy thereof is filed herewith as part hereof, marked A."

The Exhibit "A," referred to is as follows:

"SINKING FUND OFFICE, *February* 13, 1894.

A committee, consisting of Messrs. Thomas L. Barrett, John H. Leathers and George W. Swearingen, appeared before the board on behalf of the banks, who are members of the Louisville clearing-house, and stated that it was the purpose of said banks to resist the payment of the license fee demanded of them under the license ordinance, approved January 29, 1894, on the ground that said banks were not legally liable to pay the same, but in order to save the sinking fund from any embarrassment occasioned by their refusal to pay said license fee, the banks, with two or three exceptions, were willing to enter into an arrangement, whereby they would pay a part of the amount demanded of them, and lend the sinking fund the balance thereof, to be repaid with interest at four per centum per annum, if it was finally decided and adjudged that the banks were not liable to pay said license fees.

226 After discussion, the president was, on motion of Mr. Tyler, seconded by Mr. Summers, authorized to enter into the following arrangement with the different banks, trust and title companies, who will be subject to the payment of the license fees, if the license ordinance is finally adjudged to be valid and enforceable:

First. To accept from each of said banks and companies a payment equal to the difference between the amount they now pay to the State for State taxes and the amount they would be required to pay for State taxes under the provisions of what is known as the Hewitt bill. This sum shall be an actual payment, not to be repaid under any circumstances, but its payment shall not in any manner, or to any extent, prejudice the banks or companies paying it or be taken as a waiver of any legal right which they have in the premises.

Second. In addition to making the above payments, the said banks and companies, save those selected to test the question involved, shall each lend the sinking fund a sum which added to said payment will equal four per centum of its gross earnings during the year 1893, and the sinking fund will execute for said loans its obligations agreeing to repay the same with interest at four per centum per annum, when, and if, it shall be finally adjudged by the court of last resort that said banks or companies are not liable to pay the license fee required by the ordinance aforesaid, but if it is finally

adjudged that they are liable to pay said license fee, then the said loans shall be taken and deemed as a payment of said license fee, and the obligation to repay the same shall be void.

227 Third. The banks or companies selected to test the questions involved will each lend the sinking fund a sum equal to four per centum of their gross earnings for the year 1893, and will receive therefor the obligations of the sinking fund as above described.

Fourth. This agreement is to be entered into with the understanding that the said banks and companies will institute without delay and diligently prosecute such actions as may be necessary to settle and adjudge the right- and liabilities of the parties in the premises, and pending such proceedings the sinking fund will not prosecute them or any of them for doing business without license.

A true copy.

Attest:

J. M. TERRY,
Secretary and Treasurer.

Stipulation between the City of Louisville, the commissioners of the sinking fund of the city of Louisville, and the banks, trust and title companies of the city of Louisville.

It is agreed between the City of Louisville, the commissioners of the sinking fund of the city of Louisville, represented by H. S. Barker, city attorney, acting under the advice and by the authority of the board of sinking fund commissioners given at a regular meeting of said board and the mayor of the city of Louisville on one part, and the various banks, trust and title companies

228 of the city of Louisville, acting by Humphreys & Davie and Helm & Bruce, their attorneys, of the other part:

First. That in February, 1894, it was agreed between the City of Louisville and the board of sinking fund commissioners, acting together in the interest of the said city, and the various banks, trust and title companies, acting through their committee, to wit: Messrs. Thomas L. Barrett, John H. Leathers and George W. Swearingen, and their counsel, to wit: Messrs. Humphrey & Davie and Helm & Bruce, that the question of the liability of said banks and trust and title companies to pay municipal taxes, either license or ad valorem, otherwise than as provided by the revenue law, commonly known as the Hewitt bill, should be tested by appropriate litigation looking to that end.

Second. In order to effectually test the question as to all of said companies they were divided into three classes, it being understood that all who had accepted the provisions of the said Hewitt bill would fall in one or the other of the classes named, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

It being understood that the trust and title companies which had accepted the provisions of the Hewitt bill, would fall in class B, named above.

229 Third. In pursuance of that agreement the sinking fund commissioners, caused to be issued warrants against the Bank of Kentucky, representing class A; the Louisville Banking Company, representing class B, and the Third national bank, representing class C, and these banks respectively applied for a writ of prohibition against the city court of Louisville proceeding with the hearing, that being the manner pointed out by the city charter for testing the validity of city ordinances.

It was distinctly understood and agreed at that time, and this agreement was made for the best interest of all parties to it, that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes. And it was also agreed that if any bank of any class should succeed in establishing a contract and the validity thereof under the Hewitt bill, that that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the Hewitt bill.

Fourth. On the faith of this agreement all of the banks and companies aforesaid paid into the sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the minutes of the sinking fund commissioners, of February 13, 1894, an attested copy of which is hereto attached as part hereof, but at a later date and in further reliance upon said agreement all
230 said banks and companies, except those actually involved in the test cases, paid the whole of the amount of taxes claimed as against them by the City of Louisville without reservation until the question thus raised should be finally disposed of.

HUMPHREY & DAVIE,
HELM & BRUCE,
For Banks, Trust, and Title Companies of the City of Louisville.
H. S. BARKER, *City Attorney.*

Approved.

C. H. GIBSON,
Pres't Com'rs Sinking Fund, City of Louisville.

A true copy.
Attest:

HUSTON QUIN.
ARTHUR PETER.
M. McLOUGHLIN."

So much of the certified transcript of the judgment in the proceedings in prohibition as is of importance has been set forth in the report of the case of the Louisville Banking Company against the same defendants.

TAFT, circuit judge, delivered the opinion of the court:

In the case of The Bank of Kentucky *v.* Stone, just decided, we have held that by the judgment of the court of appeals and of the Jefferson circuit court in the prohibition suits, the city of Louisville was estopped to deny as against the parties to that judgment, that they had an irrevocable contract of exemption from any
231 greater burden of taxation than that imposed in the Hewitt act. The complainant in the case now before us was not a party to the record in either of the three prohibition suits, but it claims the benefit of the judgment therein as a privy to the parties. This privity is said to arise from an agreement between the city of Louisville on the one part and certain banks of Louisville, including the complainant, on the other, by which it was stipulated that the controversies between all the banks and the city should abide the event in test suits to be instituted by three banks selected to represent three classes.

Two questions are presented for our consideration:

First. Was the contract described in the bill and attached to it as an exhibit, the contract of the city of Louisville?

Second. If so, did the contract bring the complainant into such relation to the prohibition judgment and the parties thereto that it may claim the benefit of the estoppel of that judgment?

First. The averment of the bill is that the contract set forth was signed by the president of the sinking fund and by the attorney for the city under the authority and direction of the mayor and board of sinking fund commissioners and by the counsel who represented the banks in said litigations. The bill further recites that the agreement was made between the city of Louisville and its sinking fund commissioners and the banks and trust companies including the complainant. Upon demurrer to the bill, these averments would doubtless be sufficient to show that the contract which was made was the contract of the city of Louisville. But the case
232 is pending also upon the motion for a preliminary injunction; and upon that motion it is proper for us to consider the answer of the City of Louisville, which by stipulation, was permitted to be filed without the withdrawal of the demurrer.

The answer contains this averment:

"This defendant denies that said alleged agreement, an alleged copy of which, or the substance of which is filed with complainant's bill, marked 'A,' was signed by the attorney for the city of Louisville, under the authority of the mayor, or that this defendant executed or delivered said alleged contract or agreement or that the same was ever authorized, ratified or approved by the general council and mayor of the city of Louisville, and said alleged agreement or contract set forth in said copy marked 'A' is not the act and deed of this defendant, and in so far as the same purports to be an agreement or contract by or with this defendant, it was beyond the lawful power or authority of the city attorney, mayor, or any other officer of this defendant to execute or deliver for or on behalf of this defendant, and the same was made without express authority of law,

and was and is null and void, and of no binding force or effect upon this defendant, nor does the same operate to prevent or defeat the power and authority vested in this defendant by said act entitled 'An act for the government of cities of the first class' approved July 1, 1893, to levy and collect its municipal taxes from the complainant and other banks and trust companies.

233 This defendant states that said commissioners of the sinking fund of the city of Louisville was, in 1894, and long prior thereto, and ever since has been a separate and distinct corporation from this defendant, organized and existing under the laws of the State of Kentucky, with power to sue and be sued, contract and be contracted with, and to do and perform all things necessary to execute the duties required and powers given by the act incorporating the same and the amendments thereto; but, neither said commissioners of the sinking fund of the city of Louisville, nor the president nor the attorney thereof, nor all of them together, had any lawful power or authority thus to bind or obligate defendant by the terms, conditions, stipulations or covenants or either of them, contained in said alleged agreement or contract at the time, in the manner or under the circumstances alleged in complainant's bill, or otherwise."

Upon a motion for a preliminary injunction, therefore, the issue is raised whether those who signed the contract on behalf of the city of Louisville were authorized to bind it thereto. We are of opinion that the city attorney was vested with ample authority to bind the city of Louisville to the contract mentioned in so far as it affected the complainant herein. By section 2909 of the Revised Statutes of Kentucky it is provided that "there shall be elected by the general council, immediately upon the assembling of the new board, a city attorney, whose duty it shall be to give legal

234 advice to the mayor and members of the general council, and all other officers and boards of the city in the discharge of their official duties. If requested, he shall give his opinions in writing, and they shall be preserved for reference. It shall also be his duty to prosecute and defend all suits for and against the city, and to attend to such other legal business as may be prescribed by the general council."

The foregoing section makes this officer the retained attorney of the city in every suit brought against it. The question at issue between the banks and the city of Louisville was whether the city could collect license taxes under one of its ordinances. The banks notified the city attorney and the commissioners of the sinking fund whose duty it was to receive the money for the benefit of the city that they intended to resist the collection of the tax by litigation. It was the duty of the city attorney under the statute above set forth to take charge of the litigations thus about to be brought. It was his duty as the attorney of the city to save, so far as he could without prejudice to the city's interest, costs which might be accumulated should suits to the number of twenty be brought and won by the banks against the city. It seems plain to us that it was within his general authority as attorney to make an arrangement with the intended litigants, by which the litigation to be brought should be reduced

in volume to as few cases as possible by means of a stipulation that all the suits involving the same questions should abide the result in one suit to be brought. We think that such a stipulation was a mere step in the management of the litigation and was en-
235 tirely under the control of the attorney retained for the suits It did not work to the prejudice of the city in the slightest. Had the suits actually been brought, a stipulation between the city attorney and the attorneys for the banks of this character would have been as clearly part of the ordinary management of the suits as any other arrangement for expediting their trial. No material distinction can be suggested between the power of the city attorney to make an agreement of this character with respect to intended *suits and suits actually filed. The control that* an attorney has by virtue of his office over the suit in which he is employed is very wide in respect to those matters that relate to the progress of the suit and the mode of reaching a conclusion and which do not deprive the client of a full opportunity to be heard by his attorney on the issues raised in the case. Such authority inheres in the relation between an attorney and client in respect to litigation and the authorities fully sustain this conclusion.

In North Missouri R. R. Co. *v.* Stevens, 36 Mo., 150, the plaintiff railroad company brought several suits against different stockholders in which the questions were precisely the same. The attorneys for the respective parties entered into a written agreement stating that as the same facts arose in all the cases they would abide by the judgment that should be rendered in one of them and that a like judgment should be rendered in each of the several cases. It was contended in that case that the attorneys who made the agreement had no authority to make the agreement and that it was void. The court sustained the agreement as within the authority of the attorney. It said:
236 "The arrangement in this case is not a compromise according to the usual acceptation of that term, for that generally applies to releasing a part of the debt, taking land instead of money, or changing the nature and character of — thing to be recovered; it comes nearer within the general management of the case."

In Ohlquest *v.* Farwell & Co., 71 Iowa, 231, a client was a party to two suits involving substantially the same question. It was held competent for his attorney to bind him by an agreement that only one of the cases should be tried, and that the judgment resulting from such trial should determine the kind of judgment to be entered in the other case. In delivering the opinion of the court, Judge Beck said:

"It is undoubtedly true that an attorney cannot consent to a judgment against his client or waive any cause of action or defense in the case; neither can he settle or compromise it without special authority. But he is, by his general employment, authorized to do all acts necessary or incidental to the prosecution or defense which pertain to the remedy pursued. The choice of proceedings, the manner of trial, and the like, are all within the sphere of his general authority, and, as to these matters, his client is bound by his action. These

rules are conceded by counsel in this case. It cannot be doubted that under them counsel for parties in several suits, involving the same issues, may, in the exercise of their general authority, consent to the consolidation of all for trial, or stipulate that the trial
237 of one shall determine the others. This pertains to the remedy pursued—to the manner of trial—and is not an agreement for judgment or a compromise. The parties are not deprived of a trial, nor is judgment rendered by consent. The counsel simply assent to a trial in a particular manner; that one trial shall settle the same issues in several cases. This is just what was done by counsel for Becker in this case. The form of agreement is that judgment in his case should follow a trial in another action. This is not an agreement for a judgment, but in effect an agreement for a manner of trial."

See, also, Eidon *v.* Finnegan, 48 Mo., 33; Gilmore *v.* American Central Ins. Co., 67 Cal., 366.

In Thompson on Trials, 1st vol., section 195, the author says:

"Where several cases are pending in court, depending upon the same facts or questions of law, it is competent for the attorneys in virtue of their general retainers, to stipulate that only one shall be tried, and that the others shall abide the result of that one."

We think, therefore, that in so far as the issues arising between the banks not actually engaged in the litigation and the city of Louisville were the same as in the three suits which were brought as test cases, the contract made by the city attorney was binding upon the city.

The next question is whether the contract made enables the complainant bank to claim the benefit of the estoppel of the judg-
238 ments thereafter rendered. We think it does. In Patton *v.* Caldwell, reported in 1st Dallas, 419, the action was on a policy of insurance. Counsel for plaintiff offered to read in evidence a special verdict that had been given in another action against a different underwriter. This was objected to on the ground that the verdict was given between other parties and therefore, not admissible; upon which an agreement of all the underwriters to be bound by one verdict was proven.

McKean, chief justice, said:

"The defendant had no opportunity of cross-examining, upon the former trial; and the answer is, that he, with the rest of the underwriters, had agreed to be bound by one verdict; which is certainly the only ground for offering the evidence proposed by the plaintiff's counsel.

Whether this agreement was made in person or by a broker mutually employed, it is equally binding on the parties; and, under the agreement, all the underwriters were fully entitled to interfere upon the former trial, and to cross-examine the witnesses then produced. Although, therefore, we should not have allowed the special verdict to be read, without full proof of the agreement; yet, on receiving that satisfaction, we think it would be unfair to sup-

press it; and, for the future, we desire that all such agreements may be entered on the records of the court."

The court then held that the verdict thus offered was not conclusive. As this latter proposition, however, is in conflict with
239 the rule laid down by the Supreme Court of the United States in a recent case of South Pacific R. R. Co., *v.* United States, 168 U. S., 1, that part of the decision cannot be regarded as authority here.

In Brown, Russell & Russell *v.* Sprague, 5 Denio, 545, several ejectments were pending between one claiming title and persons having only the naked possession of the lands. An agreement was made between all the parties that the suits should be stayed and await the event of a suit between other parties in which the same questions arose. It was held that a judgment in that suit would operate as an estoppel between the parties to the agreement.

Mr. Freeman, in his work on Judgments, says, section 174:

"Neither the benefit of judgments on the one side, nor the obligations on the other, are limited, exclusively to parties and their privies. Or, in other words, there is a numerous and important class of persons who being neither parties upon the record nor acquirers of interest from those parties after the commencement of the suit, are nevertheless bound by the judgment. Prominent among these are persons on whose behalf and under whose direction the suit is prosecuted or defended in the name of some other person. * * * The fact that an action is prosecuted in the names of nominal parties cannot divest the case of its real character, but the issues made by the real parties, and the actual interests involved, must determine what persons are precluded from again agitating the question, and who are estopped by the previous
240 decision. Whenever one has an interest in the prosecution or defense of an action, and he, in the advancement or protection of such interest, openly takes substantial control of such prosecution or defense, the judgment, when recovered therein is conclusive for and against him to the same extent as if he were the nominal as well as the real party to the action. * * * Where one seeks the benefit of an estoppel by judgment on the ground that he was the real party in interest in an action, he must show that he conducted the action or defense openly to the knowledge of the adverse party, and for the protection of his own interests."

These principles are sustained by the cases cited by that learned author. See Cole *v.* Favorite, 69 Ills., 457; Wood *v.* Ensell, 63 Mo., 193; Executors of Tate *v.* Hunter, 3 Strobhart, 136–140; Palmer *v.* Hayes, 112 Ind., 289; Gill *v.* United States, 7 Court of Claims, 522, 526. See also Herman on Estoppel, section 139.

In Greenleaf on Evidence, vol. 1, section 523, the principle is stated as follows:

"But to give full effect to the principles by which parties are held bound by a judgment, all persons who are represented by the parties and claim, under them, or in privity with them, are equally concluded by the same proceedings. We have already seen that the term privity denotes mutual or successive relationship to the

same rights of property. The ground, therefore, upon which persons standing in this relation to the litigating party are bound
241 by the proceedings to which he was a party is, that they are identified with them in interest; and wherever this identity is found to exist, all are alike concluded. Hence, all privies, whether in estate, in blood, or in law, are estopped from litigating that which is conclusive upon them with whom they are in privity. And if one covenants for the results or consequences of a suit between others, as if he covenants that a certain mortgage, assigned by him shall produce a specified sum, he thereby connects himself in privity with the proceedings, and the record of the judgment in that suit will be conclusive evidence against him."

In the case of Rapelye & Purdy *v.* Prince & Prince, 4 Hill, 119, Mr. Justice Bronson, speaking for the supreme court of New York, said:

"When one covenants for the results or consequences of a suit between other parties, the decree or judgment in such suit is evidence against him, although he was not a party."

In the present case there can be no doubt from an examination of the contract and the averments of the bill that the three suits which were conducted were openly conducted in the interests of all the parties to the agreement with the knowledge and by the consent of the city of Louisville, and that the counsel who appeared for the parties to the records were at the same time discharging their duties as counsel for the other banks who had made the agreement. If any one can be bound by a judgment to which he is not a party, it would seem that the banks here must have been so bound.
242 Had the result gone the other way, and a judgment been rendered in favor of the city of Louisville in the cases referred to, it cannot admit of doubt that all the banks would have been bound by the decision. As part of the consideration for the settlement of the litigation in the manner fixed by the agreement, the banks paid to the sinking fund commissioners for the city of Louisville the substantial sum of $150,000. Had the agreement not been entered into, it is certain that the complainant would have obtained formal judgment in a prohibition suit and would now have been in the same position as the Louisville Banking Company! Relying on the binding character of the agreement, however, judgment was not taken in the name of complainant. Equity and justice require that effect should be given to an agreement upon the faith of which $150,000 was immediately paid to the city and a formal judgment was not taken. It is just that inasmuch as the banks would have been bound by a diverse judgment, they shall have the benefit of a judgment which was rendered in favor of their colleagues selected to represent them in the suit. This conclusion necessarily leads to the result that the demurrer to the bill must be overruled and the motion for a preliminary injunction allowed.

243 *Opinion. No.* 6583.

Circuit Court of the United States, District of Kentucky.

LOUISVILLE TRUST COMPANY
vs.
SAMUEL H. STONE and Others. } No. 6583.

Opinion. No. 6584.

LOUISVILLE TRUST COMPANY
vs.
CITY OF LOUISVILLE. } No. 6584.

Opinion. No. 6581.

FIDELITY TRUST & SAFETY VAULT CO.
vs.
SAMUEL H. STONE and Others. } No. 6581.

Opinion. No. 6582.

FIDELITY TRUST & SAFETY VAULT CO.
vs.
CITY OF LOUISVILLE. } No. 6582.

Before Harlan, circuit justice, and Taft and Lurton, circuit judges.

TAFT, circuit judge, delivered the opinion of the court.

The Louisville Trust Company and the Fidelity Trust & Safety Vault Company were parties to the agreement made between the banks of Louisville and the city attorney, by which the question of the liability of the banks of Louisville under the license ordinance of the city of Louisville was carried by three test cases to the court of appeals. By that agreement these trust companies were included within the clause represented by the Louisville Banking Company, as a bank of the State, organized since the act of 1856.

244 The trust companies were organized under charters, each of which contained the following clause: "But nothing herein shall be construed to permit said company to discount paper or to engage in the business of banking." By subsequent amendments some additional powers were given which are usually exercised by banks, but there was no amendment to the charter of either permitting it to engage in the business of regular or general banking. The power to qualify and act in various trust or fiduciary capacities constituted the chief object in the organization of these companies. Section 5 of the amended charter of the Louisville Trust Company contains the following:

"For purposes of taxation, this company shall be classed and treated as one of the banks of this State, and shall be subject to and

pay the same rate of taxes, to same parties, at the same time, in same manner and for the same purposes only, as may be provided by law from time to time, as the banks doing business in this State."

In the case of The Louisville Trust Co. *v.* City of Louisville, 30 S. W. R., 991, Judge Grace, in the course of his opinion, expressed the view that this was not a bank, and that it was not entitled to any exemption from taxation, because it rendered no public service to the State, and that this was the only ground upon which it could be excused from taxation under the old constitution. It has been held by the court of appeals of Kentucky that it was competent to exempt banks, under that constitution, because they did render public services. It is thus apparent that the question whether the trust companies had an irrevocable contract under the Hewitt act,
245 was not the same as that presented with respect to the banks.

The power of an attorney to bind his client by consenting that a decision in another case shall be binding upon him in the case in question, can only exist where the two cases involve the same questions of law and fact. Otherwise, the attorney might conclude his client's rights by an event having no relevant relation to the merits of the controversy in which he is acting as attorney. Hence, it follows that the contract of the city attorney on behalf of the city of Louisville, in so far as it attempted to make the taxation of the trust companies dependent upon the judgments in the three test cases of the banks, was beyond his authority, and that the trust companies cannot rely on those judgments as *res judicata*.

Indeed, the same conclusion may be reached irrespective of the city attorney's authority. The point adjudged in the three cases was, that banks accepting the Hewitt act had an irrevocable tax exemption. The point at issue here concerns the tax exemption of the trust companies. This is a different question, as we have seen, and is not foreclosed, therefore, by the judgment in favor of the banks. The indespensable element in a successful plea of *res judicata* is that the point adjudged and the point at issue shall be the same.

If the complainants cannot rely on the bar of the prior adjudication, we must of course reach the same conclusion upon the question of irrevocable contract on its merits that we have reached in the case of the Northern Bank of Kentucky.

The motion for preliminary injunction must, therefore, be denied, the demurrers to the bills sustained and the bills dismissed.

246 *Opinion. No. 6575.*

Circuit Court of the United States, District of Kentucky.

FIRST NATIONAL BANK
vs.
SAMUEL H. STONE and Others. } No. 6575.

Opinion. No. 6576.

FIRST NATIONAL BANK
vs.
CITY OF LOUISVILLE. } No. 6576.

Opinion. No. 6569.

AMERICAN NATIONAL BANK
vs.
SAMUEL H. STONE and Others. } No. 6569.

Before Harlan, circuit justice, and Taft and Lurton, circuit judges.

TAFT, circuit judge, delivered the opinion of the court:

The First national bank was organized in October, 1863, under the national banking laws, and its charter rights were extended September 6, 1882. It did not formally accept the Hewitt act in accordance with the terms of that act. The averment of the bill upon this point is:

"Your orator shows that from the first day of July, 1887, although it was not by the United States banking acts bound to submit to taxation under the 'Hewitt bill,' it nevertheless did so, and from said date regularly reported to the auditor of public accounts of the State of Kentucky under and in accordance with the provisions of said 'Hewitt bill,' and the said State through its proper offi-
247 cers received and appropriated said taxes paid by your orator as aforesaid. Your orator has no real estate and never had. In the way above stated, your orator accepted the provisions of the 'Hewitt bill.'"

The American national bank was organized after the passage of the Hewitt act, so that it could not accept that act in accordance with its provisions. The averment of its bill upon this point is:

"Your orator shows that from the first day of July, 1890, although it was not by the United States banking acts bound to submit to taxation under the Hewitt bill, it nevertheless did so, and from said date regularly reported to the auditor of public accounts of the State of Kentucky under and in accordance with the provisions of said Hewitt bill, and the said State through its proper officers received and appropriated said taxes paid by your orator as aforesaid. Your orator has since its organization paid to the city taxes on the build-

ing in which it does business. In the way above stated, your orator accepted the provisions of the Hewitt bill."

Each of the bills in the above-entitled causes contained these averments:

"Your orator respectfully shows to the court that the existing laws of the State of Kentucky do not provide for taxing the shares of your orator as permitted by the act of Congress, but attempt to subject to taxation its franchise granted by the Congress of the United States and its other intangible property, such as its surplus, undivided profits and investments, without lawful right to
248 do so, and contrary to the act of Congress in such cases made and provided. Your orator has never consented to this method of taxation, but has always protested against the same as illegal and contrary to the act of Congress. And your orator respectfully submits that said statute of Kentucky is repugnant to the act of Congress in such cases made and provided, and because of said repugnancy is void and of no binding force as against your orator.

"Your orator further shows and submits to the court that by reason of the formal contract entered into by all the other banks and trust companies in the city of Louisville, and by reason of the former adjudication in favor of said banks and trust companies establishing the validity of said contracts, they will escape local taxation, except on the houses owned by them, respectively, in which they respectively do business, and your orator, coming as it does into direct competition with said institutions, will be driven out of business if subjected to local taxation; wherefore, it respectfully insists it is protected by the acts of Congress against such unjust discrimination."

The first question is whether the revenue act of November, 1892, taxes the national banks in a way inconsistent with the permission given by Congress.

Section 5219 of the Revised Statutes of the United States is as follows:

249 "Nothing herein shall prevent all shares in any association from being included in the valuation of the personal property of the owner or holder of such shares in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county or municipal taxes, to the same extent according to its value, as other real property is taxed."

The State derives its power to tax national banks from this section. The question is whether the provision for taxation of banks

under the revenue act of November, 1892, is a violation of this section. The provisions of that act are that all banks shall be taxed upon their real property, and personal property and also taxed upon their franchises to be assessed by subtracting the value of the tangible property from the value of the capital stock of the company. It is argued that the State has no right to tax the franchises conferred by the Government of the United States. But it has been decided in the cases of Henderson Bridge Co. *v.* Kentucky,
250 166 U. S., 150, and Adams Express Company *v.* Kentucky, 166 U. S., 171, that the word franchise in the revenue act of 1892 was not employed in a technical sense, and that the legislative intention was plain that the entire property, tangible and intangible, of all foreign and domestic corporations, and all foreign and domestic companies, possessing no franchise, should be valued as an entirety, that the value of the tangible property should be deducted, and that the value of the intangible property thus ascertained should be taxed under these provisions. It will be seen therefore that the taxation upon all banks is nothing but a tax upon the value of its capital stock. There is no discrimination whatever against national banks in favor of State banks because they are all subject to the same rule of taxation. The Supreme Court of the United States has given section 5219 a very liberal construction in sustaining State taxation of national banks if not inconsistent with the purpose of Congress to prevent a discrimination in favor of State banks as against national banks. Mr. Justice Miller, in delivering the opinion of the court in the case of Davenport Bank *v.* Davenport Board of Equalization, 123 U. S., 83, said:

"It has never been held by this court that the States should abandon systems of taxation of their own banks, or of money in the hands of other corporations, which they may think the most wise and efficient modes of taxing their own corporate organizations, in order to make that taxation conform to the system of taxing the national banks upon the shares of their stock in the hands of their owners. All that has ever been held to be necessary is, that
251 the system of State taxation of its own citizens, of its own banks, and of its own corporations shall not work a discrimination unfavorable to the holders of the shares of the national banks. Nor does the act of Congress require anything more than this; neither its language nor its purpose can be construed to go any farther. Within these limits, the manner of assessing and collecting all taxes by the States is uncontrolled by the act of Congress."

See also Mercantile Bank *v.* New York, 121 U. S., 138, and Bank of Redemption *v.* Boston, 125 U. S., 60; Palmer *v.* McMahon, 133 U. S., 660.

It is contended, however, that the definition given to the term capital stock used in the revenue act of 1892 includes more than the sum of the value of the shares of the capital stock of a corporation. It is true that in the case referred to, Henderson Bridge Co. *v.* Kentucky, 17 Ky. L. Rept., 390, the court of appeals held that it was proper for the board of valuation and assessment to fix a valuation of the capital stock of the Henderson Bridge Company at more than

the market value of the sum of the shares of the capital stock. In that company, the shares of capital stock aggregated $1,000,000, the market value of which was 90 cents on the dollar. It had a mortgage upon its property to secure a bonded indebtedness of $2,000,000. In reaching the amount of the capital stock of the bridge company the board added the market value of the shares of the capital stock to the value of the mortgaged property, taking it for granted that that would show the real amount of property, tangible and intangible, owned by the company. This mode of assessing the capital stock was held to be proper under the law. In such a case of course the assessment for taxation would be more than the value of the shares of the capital stock. There could be no such result, however, in the application of the law to national banks, because they are not permitted to issue bonds and do not hold property under mortgage. It is not averred in the bill and it does not appear that the assessment of valuation for taxation against these complainant banks exceeds the market value of their shares of capital stock. However the law may operate, therefore, upon the class of corporations which have bonded indebtedness, it certainly does not in the case of the national banks tax anything more than the equivalent in value of the shares of the capital stock. If it does so, there ought to be some averment to show this. Supervisors *v.* Stanley, 105 U. S., 311. The bill contains no such statement.

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Another objection to the operation of the revenue act upon the complainants is, that certain of the State banks and national banks are now, by reason of the previous litigation, enabled to escape all taxation except that provided under the Hewitt act, and that this is a discrimination against them in violation of section 5219, above quoted.

In Lionberger *v.* Rouse, 9 Wall., 468, the fact that a State could not collect a tax past a certain amount in the two banks of issue, which it had at that time, was held no bar to the collection of the tax on the shares of the national banks for a greater amount. In this case Mr. Justice Davis, who delivered the opinion of the court, concluded as follows:

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"Without pursuing the subject further, it is enough to say, in our opinion, Congress meant no more by the second limitation in the proviso to the forty-first section of the national banking act than to require of each State, as a condition to the exercise of the power to tax the shares in national banks, that it should, as far as it had the capacity, tax in like manner the shares of banks of issue of its own creation."

In the former litigation certain banks have been declared to be free from taxation by reason of a contract of exemption. By subsequent decisions in the same court—if that be a material question in that court—the former ruling was declared erroneous. But by the doctrine of *res judicata* the particular banks engaged in the prior litigation are able to rely upon it as a bar to the enforcement of the law of 1892. That law, by its terms, applied to all banks equally. In so far as the State has had the power to do so, therefore, it has

made the taxation of all banks equal. We do not think that the exceptions to the operation of the law, produced by the accident of litigation, can make the discrimination arising between the parties to the litigation, and those who were not parties, a discrimination within the inhibition of section 5219 of the national banking act.

The motions for preliminary injunction will be denied, the demurrers to the bills will be sustained, and the bills dismissed.

254 *Opinion. No.* 6585.

Circuit Court of the United States, District of Kentucky.

PRESIDENT, DIRECTORS, AND COMPANY OF THE NORTHERN Bank of Kentucky
vs.
SAMUEL H. STONE and Others, CITY OF LEXINGTON, County of Fayette; City of Paris, County of Bourbon, and The City of Covington. } No. 6585.

Before Harlan, circuit justice, and Taft and Lurton, circuit judges.

The bill in this case averred that the complainant bank was a corporation originally organized by an act of the General Assembly of Kentucky, approved Feb. 20, 1835, to do a general banking business. Its corporate life was made to terminate May 1, 1865. The act of Feb. 15, 1858, continued the charter privileges of the complainant in full force for twenty years from May 1, 1865, upon its acceptance of certain conditions to which the complainant duly consented. An act approved February 6, 1882, provided that the charter rights and privileges of the complainant should continue and extend in full force for twenty years from and after May 1, 1885; reserved to the General Assembly the right to alter, change, amend or repeal the act, and the charter and amendments thereto; and required that before the act should go into effect it should be approved and accepted by a majority in interest of the stockholders. The act was never accepted or approved by the stockholders. Thereafter another act was passed, approved March 6, 1884, providing that the chartered rights and privileges of
255 the complainant should be extended in full force for twenty years from and after the first of May, 1885, and that the act should go into effect when it should be approved by the stockholders of the bank and notice of the approval given to the governor of the Commonwealth. It did not contain the clause reserving to the legislature the power of repeal. It was duly accepted. The 15th section of the original charter of the complainant required the cashier to pay to the treasurer of the Commonwealth twenty-five cents on each one hundred dollars of stock held and paid for in said bank which should be in full of all tax or bonus; provided, that the legislature might increase or diminish the same, but at no time should the tax exceed fifty cents on each one hundred dollars of stock paid in for said bank. By an act of

1836, the legislature increased the tax to fifty cents, and this the complainant paid each year down to July 1, 1886, when the Hewitt law was passed. The court of appeals of Kentucky as early as 1838 held that the language in the complainant's charter constituted a contract with the State, which was inviolable, and a limitation on the legislative power to tax the stock of the bank, or its property. Johnson *v.* Commonwealth, 7 Dana, 339. By a subsequent decision it was determined by the same court that the limitation included taxation by any of the municipal subdivisions of the State, and therefore prevented such municipal subdivisions from taxing the real estate of the bank, although situated within their boundaries. Commonwealth and Greenup County *v.* Farmers' Bank, 6 Bush, 127. The complainant duly accepted, within the required time, the benefit of the Hewitt act by filing a consent
256 in writing under the seal of the bank with the governor of the Commonwealth; and paid the tax under the Hewitt act from that time down to July 1, 1893. Thereafter the auditor of the State refused to receive the tax under the Hewitt law, although tendered by the complainant. Upon the announcement of the decision of the court of appeals in 1895, payment was accepted from the bank for the amount due under the Hewitt law from 1893 to 1896. The principal office of the complainant is in the city of Lexington, in the county of Fayette. It has one branch in the city of Paris, in the county of Bourbon, and another in the city of Covington. The bill avers that the revenue act of 1892 violates the contract between it and the State in the charter and the amendments to the charter and the contract between it and the State under the Hewitt law.

The bill further avers that under the revenue act of 1892 the board of valuation and assessment certified to the authorities of the county of *Bourbon* the proportion of the franchises found to be taxable by the county of Bourbon in the year 1893; that thereupon the county of Bourbon caused to be placed in the hands of James McClure, sheriff of said county, and the collector of its revenue, the tax bill made out accordingly; that on July 13, 1894, the complainant filed in the circuit court of Bourbon county—that being a court of general jurisdiction—its petition against the said county and sheriff, setting forth in said petition, in apt terms, the contract between it and the State in regard to taxation under the original charter and under the Hewitt law, claiming that no taxes could be collected from the complainant except in pursuance thereof dur-
257 ing its charter life, and that the act of November 11, 1892, was unconstitutional and void, as impairing the obligation of these contracts, and praying the court to establish these contracts and to enjoin the said Bourbon county and McClure, the sheriff, from attempting to collect any taxes contrary thereto; that issue having been joined upon the complainant's said suit, a judgment was rendered in the Bourbon circuit court to the effect that the act of November 11, 1892, did not violate any contract between the complainant and the State, and judgment was entered accordingly; that thereupon the complainant appealed from said judgment to the

court of appeals of Kentucky; that in that court, its appeal having come on to be heard, was argued by counsel, among others, by the attorney general for the Commonwealth of Kentucky on behalf of the Commonwealth, who insisted upon the affirmance of the judgment; but the court adjudged that the judgment of the lower court was erroneous, and remanded the case to the Bourbon circuit court for a judgment in conformity to its opinion, in which opinion it was held that the Northern Bank of Kentucky had an irrevocable contract under the Hewitt act and its charter which prevented the authorities of the State or any of its municipal subdivisions from imposing any other tax than that prescribed in the Hewitt act. The bill concludes as follows:

"The premises considered, the complainant says it has been fully and finally adjudicated in proceedings between it and the said Bourbon county—which represented the Commonwealth, and in law all other municipalities deriving power from the Common-
258 wealth—that complainant's contract is valid and enforcible, and that the complainant cannot be subjected to any greater rate of taxation than that agreed upon by it under the Hewitt law; if the Commonwealth of Kentucky shall be adjudged to have retired from said contract, then to no greater rate of taxation than is provided for under the complainant's charter and amendments."

TAFT, circuit judge, delivered the opinion of the court:

Under the decision already rendered in the case of The Bank of Kentucky against Stone and others there can be no doubt that on the case made both in the bill and on the proof, the defendants, The Board of Valuation and Assessment and Bourbon County, are *se*topped by the former adjudication from asserting that the complainant bank is liable for any taxes to Bourbon county under the revenue act of 1892, because, as between the complainant and that county, it was adjudicated that the complainant had an irrevocable contract with the Commonwealth by which all taxation against it should be limited to the tax provided in the Hewitt act, and that the tax upon the franchise under the revenue act was a violation of such contract.

It is also contended on behalf of the complainant that the other defendants, Fayette County, The City of Lexington, The City of Covington, and The City of Paris, are equally bound by the adjudication against the county of Bourbon. We do not think that this contention can be sustained. The theory seems to be that, as the county of Bourbon is a municipal corporation under the State
259 government, the State is bound by the adjudication against it, and therefore every other subdivision is bound. It seems to us that this would be extending the doctrine of *res judicata* further than any authority will justify. The argument is based upon the decision of the court of appeals of Kentucky in Franklin County Court *v.* The Deposit Bank of Frankfort, 87 Kentucky, 382. In that case, the Deposit Bank of Frankfort was seeking to enjoin the county court of Franklin county from levying a tax upon its property in addition to the tax of fifty cents a share upon its stock

which its charter provided should be in full of all tax or bonus. It was held that this was a contract which prevented any additional tax in any form upon its property by the State. The court then continued:

"But it is contended that its terms do not bar the county and city from levying and collecting taxes for county and city purposes. In this position counsel clearly overlook the fact that the county and city are integrant parts of the State, and that they cannot levy and collect taxes without the authority of the State conferring that right upon them. So the absurdity is presented that the State contracts with appellee, in consideration of its paying fifty cents on each one hundred dollars of its capital stock, to release it of all tax or bonus—this is the meaning of the language—and at the same time authorizes local subdivisions to levy and collect other taxes off of the appellee. That is to say, that the State, by its contract with the appellee, deprives itself of the right to levy and collect other taxes off of the appellee, but may, notwithstanding, authorize
260 all of its subdivisions, if the appellee's property were distributed in all of them, to levy and collect other or additional taxes off of it. It seems that it would occur to one, at first blush, that such a procedure would be a palpable violation of the contract. Under such a contract between individuals a doubt could not exist. The State when she makes a contract, based upon a valuable consideration, stands upon precisely the same footing."

This decision adjudged two things, first that the State had power by contract to impose a limitation upon the taxing power whether exercised by itself or by municipalities in which it might vest the same power, and second, that the language of the restriction in this case must be construed as intended to limit the whole power whether exercised by the State or with the State's permission by municipalities. The argument of counsel assumes that as the county derives its power to tax from the State which is all that was decided in the case cited, it is, in levying taxes, the mere agent of the State, and therefore a judgment against the county on a tax question is a judgment against the agent in respect of the business of the principal and is binding upon the latter as a privy. Indeed, the argument goes further. It assumes that a county is a part of the State government and therefore a judgment against the county is a judgment in fact against the State. This is applying the doctrines of agency and privity under circumstances to which they have but little application. The source of all political power including the power to tax is in the people of the State. By a constitution they create
261 a State government and a legislature and confer upon the legislature power to organize local municipal governments and to give such governments the power to levy taxes in order to discharge their other appointed functions. The municipal governments are entities distinct from the State government, incurring liabilities of their own in no way binding upon the State, and acquiring the rights and property in which the State has no property interest. Except where the law makes the municipal government an agent for the State in collecting the State's taxes or in discharging some

other State function, there is no relation between the one and the other of principal and agent as that relation is usually understood in the law. The State may through its legislative branch confer upon, and withdraw from the counties and cities power of taxation, but when the power thus conferred is for the benefit of the local community in which it is to be exercised, its exercise is not by an agent for a principal; it is by a quasi-independent government for the benefit of the people within its limits. The legislature, if not restrained by the constitution, may by contract with individuals limit its power either to levy taxes itself or to grant the right of taxation to municipalities; and the individual may avail himself of such restriction by resisting taxation in violation thereof either by the State or municipality. But in a controversy between the individual and the municipality as to the restriction, its existence or extent, the latter is contending for the benefit of itself and its people, not for the State and its people. The taxes it proposes to collect are
262 to be spent not for the State at large, but for the convenience and benefit of the people within its limits. In seeking by suit to establish its right to tax, therefore, the city or county is not acting as agent for the State but for itself. Hence the judgment is not binding upon the State as principal.

The only other possible relation of privity of the State to the litigation must grow out of the fact that it involves the validity of a power granted by the State to the city or county; but this does not make the State privy to the judgment. In granting the power the State did not enter into an enforceable covenant of warranty with the counties and cities that the power as against every individual was valid. Certainly it cannot be claimed that the State could be vouched in by the county or city as a warrantor of the validity of the power, or by notice of the pendency of the suit could be bound conclusively by the subsequent judgment. If the contention of counsel for the complainant is sound, it must follow that the State and all its municipalities, great and small, would, by a judgment in favor of an individual or corporation against a village in a remote county adjudging a limitation upon the taxing power of the State, be estopped to deny the limitation in any future litigation with the same individual or corporation, although no appeal may have been taken to a higher court, and although neither the State nor the other municipalities may have had any notice whatever of the litigation or any right or opportunity to be heard upon the question decided. We do not decide, because it is not necessary to do so, whether a county or city would be privy to a judgment against the State adjudging a limitation upon the taxing
263 power; but it suffices to say that the question is in some important respects different from the one we have been discussing.

The case of People *v.* Holladay, 93 Cal., 241, does not, it seems to us, support the contention of the complainant. In that case the question was of the title to certain property claimed to have been dedicated as a park. The lot was situated in the city of San Francisco and the city and county of San Francisco brought suit in

ejectment to recover possession of the tract from the defendant who had obstructed the use of the same by the public and excluded them therefrom. In this action the city and county were defeated and a judgment rendered, finding that the defendant was the owner of the undivided 19/20 of land, and his title thereto was quieted as against the city and county. Subsequently the attorney general on behalf of the people of the State on relation of one Bryant, brought another suit raising the same question and seeking to oust the defendant from the possession of the same tract. It was held that the city and county of San Francisco had the authority to maintain an action for the purpose of preserving the rights of the general public to the use of squares, or land claimed as such, within its limits, and in such action it was authorized to put in issue the alleged rights of the people to such easement; and the State was bound by the result of such litigation, if the same was not collusive. It is necessary for us to express an opinion upon the correctness of this decision because it can be easily distinguished from the case at bar. The city and county of San Francisco in the former litigation represented the same public which was represented by the
264 State in the case before the court. The controversy was over the public use in the city of land claimed as a public square.

It was obvious that the city, county and State were representing the same interest and the same right with respect to exactly the same subject-matter. In the present case the subject-matter of the former litigation was the taxes due from the complainant bank to Bourbon county—taxes which were to be expended by Bourbon county for county purposes and for the benefit of the people living in Bourbon county. The subject-matter of the present action which it is sought to conclude by the former action is the taxes due from the complainant bank to the city of Paris to be expended for the benefit of the people of that city, to the county of Fayette to be expended for the benefit of the people of Fayette, to the city of Lexington to be expended for the benefit of the people of Lexington, and to the city of Covington to be expended for the benefit of the people of the city of Covington. The rights of these various municipal corporations to the taxes claimed grow out of the same revenue act of November, 1892, but the parties and the persons in interest are different.

We have not deemed it necessary to consider another serious objection which might be urged to the use of a decree against Bourbon county to bar the State and other counties, and that is that in the absence of power to enjoin the State in a suit, it would be difficult to justify the plea against the State of *res judicata* based on a decree of injunction against a municipality or State agency which does not enjoy the same immunity. To give the decree the effect would seem to violate the State's exemption from suit. It suffices,
265 however, to place our decision on the ground first above stated.

The fact that the attorney general appeared on behalf of the Commonwealth in this litigation when it reached the court of appeals is not a circumstance which could be held to bind the Commonwealth and

all of its agencies by the litigation. There were a great many tax cases pending before the court at the same time. In some of these cases, the Commonwealth was a party and the attorney general was therefore present to argue the question on its behalf in those cases. Even if this had not been the case, the case of Carr *v.* The United States, 98 U. S., 433, shows that the appearance of the attorney general on behalf of the counties could not bind the State. In the case referred to the point in controversy was over the title to land of the United States to certain lots in possession of its officers in San Francisco. The United States filed a bill to quiet title to the property. The defendant set up by way of estoppel certain judgments in ejectment rendered by the State court at the suit of his grantor against certain officers of the Government who as its agents, had possession of the lots. In those actions the United States district attorney and additional counsel employed by the Secretary of the Treasury appeared for the defendants and the question of title had been the same. It was held that the former judgment was not an estoppel against the United States. Mr. Justice Bradley, in delivering the opinion of the court, said:

"It may be contended that the United States consented to have its title determined in these cases, and that such consent was manifested by the employment of the district attorney and addi-
266 tional counsel to aid in the defense. But we do not think that any such inference can be legally deduced from the action of the Secretary of the Treasury. He may have deemed it prudent to assist the officers who were sued, without intending to waive any of the rights of the Government. And, in fact, he had no authority to waive these rights."

The attorney general of the State in these cases appearing in the court of appeals of Kentucky for the county of Bourbon did not intend to waive any rights of the State, and, so far as appeared, he had no authority to do so.

Our conclusion therefore is that the complainant bank cannot in its controversy with the City of Lexington, Fayette County, the City of Paris and the City of Covington and with the board of valuation and assessment so far as concerns the apportionment and certification of the assessment by the board to *those* municipalities, rely upon or derive any benefit from the decree in the complainant's favor against Bourbon county.

We are thus brought to the question whether, as between the defendants just named and the Northern Bank of Kentucky, the latter has by virtue of its acceptance of the Hewitt act an irrevocable contract with the State of Kentucky, by which the taxes to be imposed during its corporate existence upon it shall be limited to those provided in the Hewitt act. A second and alternative question is presented by the bill of the bank and by the argument of its counsel. It is contended that even if the State had the right at any time to withdraw from the contract with the complainant bank entered into by the latter's acceptance of the Hewitt act, there must
267 be restored to the complainantthe ta x limitation under its charter which it was enjoying whenit accepted the terms of the Hewitt act.

The original charter of the bank granted in 1835, provided that it should pay into the treasury twenty-five cents a share of stock which should "be in full of all tax or bonus; provided that the legislature may increase or diminish the same, but at no time shall the tax exceed fifty cents on each" share of the stock. In 1836 the legislature increased the tax to 50 cents a share. In 1838 this was held by the court of appeals of Kentucky to be an irrevocable contract between the bank and the State preventing the State from taxing the property of the bank or its stock either against the bank or against its holders. (Johnson *v.* Commonwealth, 7 Dana, 339.) In 1869, it was held by the same court that the same contract in another charter prevented taxation of the bank by counties and cities. Farmers' Bank *v.* Commonwealth, 6 Bush, 127. These decisions never have been overruled. Manifestly if the limitation was continued in extensions of the charter, it was broad enough to prevent taxation by the counties and cities, defendants in this case, under the revenue act of 1892.

The original charter of the bank expired May 1, 1865. By an act approved February 15, 1858, the chartered privileges and rights of the president, directors and company of the Northern Bank of Kentucky were continued in force for twenty years from the first day of May, 1865. The extension was granted subject to certain restrictions on the powers of the bank not contained in the original charter and imposed on it the obligation to establish certain branches.

268 In 1882, the legislature passed an act to extend the charter of the bank for twenty years from May 1, 1885. That act contained this clause:

"SECTION 3. The General Assembly of the Commonwealth of Kentucky hereby reserves to itself the right to alter, change, amend or repeal this act, and the charter and amendments thereto extending this act at its pleasure."

This act was not accepted by the bank in accordance with its terms. Two years later another act was passed which read as follows:

"SECTION 1. That the chartered rights and privileges of the president, directors and company of the Northern Bank of Kentucky shall continue and be extended in full force for twenty years from and after the first day of May, one thousand and eight hundred and eighty-five.

"SECTION 2. That said bank, under the continuance and extension hereby granted, shall be subject to all the restrictions, limitations, penalties, conditions and duties, and be entitled to all the rights granted to and imposed upon it by the act of its incorporation, and the acts amendatory of or relating thereto.

"SECTION 3. Said bank may be known by, and sue and be sued, contract and be contracted with, by and under the name of the Northern Bank of Kentucky, as fully as by and under its present name.

"SECTION 4. This act shall go into effect when it shall be approved by the stockholders of said bank at their regular annual meeting, or

at a called meeting ordered for the purpose by the presiden
269 and directors of said board, at which called meeting a ma
jority in interest of said stockholders shall be present. Notice of said approval shall be given by the president of the bank to the governor of this Commonwealth."

The question is whether this act is to be construed and read with the act of 1856, as a part of it. The act of 1856, read as follows:

"SECTION 1. That all charters and grants of or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: Provided, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested.

"SECTION 2. That when any corporation shall expire, or be dissolved, or its corporate rights and privileges shall cease by reason of a repeal of its charter, or otherwise, and no different provision is made by law, all its works and property, and all debts payable to it, shall be subject to the payment of debts owing by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued as before, for the purpose of settlement and distribution as aforesaid.

"SECTION 3. That the provisions of this act shall only apply to charters and acts of incorporation to be granted hereafter; and that this act shall take effect from its passage."

270 The court of appeals of Kentucky, in the case of The Franklin County Court *v.* Deposit Bank of Frankfort, 87 Ky., 382 (June, 1888), held that the act of 1856 did not apply to subsequent acts extending charters granted before its passage, and that the exemption from further taxation was as inviolable under the extended charter as it was during the life of the original charter. But in the case of Deposit Bank of Owensboro *v.* Daviess County, 39 S. W. R., 1030 (March, 1897), a majority of the court of appeals expressly overruled the decision in Franklin County Court *v.* Deposit Bank, and held that the act of 1856 must be read into all charter extensions granted after its passage, whether the original charter was granted before the act of 1856 or not. It was said that the last ruling was *obiter dictum*, and unnecessary in deciding the case before the court. But this is by no means clear. In the latter case the question involved the construction of the Hewitt act. In all discussions of that act it had been supposed to be a material preliminary step to determine whether there were any banks which would surrender an irrevocable tax-exemption privilege in accepting the terms of the Hewitt act. We think we must, therefore, treat the two decisions above cited as conflicting; and, in any event, it is for us now to exercise an independent judgment in the matter.

In the earlier decision the court of appeals held that the extension related back to the date of the original charter, and that therefore the act of 1856 did not apply, because, by its third section, its application was limited "to charters and acts of incorporations to be granted" thereafter. It was further held that even if the act
271 of 1856 would apply to extensions of old charters, it did not do so here, because the various provisions of the extension

act of 1872 manifested an intention of the legislature so clear as to be "plainly expressed" that the act of 1856 should not apply. We cannot concur in the view that the act of 1856 did not apply to subsequent extensions of old charters. The purpose of such a reservation act is too clear to be misunderstood. It was to prevent the granting of corporate powers, franchises or privileges in such a way as to be beyond the control and regulation of the legislature, unless the legislature "plainly expressed" its purpose to reserve the power to alter, amend or repeal. The reason for the act was the inconvenience experienced from the irrevocable charters theretofore granted. Is it to be supposed that the legislature, in the act of 1856, intended to allow those charters, which had led to the enactment of the law, to be extended without being affected by its restrictive provisions? The first section of the act applies "to *all* charters and grants of or to corporations, *or amendments* thereof, and *all other* statutes." The third section limits the application of the act "to charters and acts of incorporations to be granted hereafter." We think that this extension was a grant to a corporation or an act of incorporation granted after the act of 1856. It seems to us a strained and narrow construction to carry back its date by relation to the time of the original charter. In some senses it is true that the extension merely carries on the same old corporation, giving it additional life, but within the purpose of the act of 1856 to prevent the granting
272 of irrevocable exemptions, the giving of additional life to such an immunity was a new grant—a new charter. It is our duty to give effect to this act so as to avoid the evil aimed at by the legislature, and no refined reasoning as to the question whether an extension is the lengthening of an old life, or the granting of a new one, ought to blind us to the palpable intention of the legislature to prevent, except by express words, the future granting of irrevocable powers, privileges or exceptions. It is well settled by the Supreme Court of the United States that tax exemptions are not favored, and are to be given the strictest construction (Ohio Life Insurance & Trust Company *v.* Debolt, 15 How., 435); and it may well follow, as a corollary to these principles, that laws passed by the legislature to prevent irrevocable tax exemptions are to be liberally construed.

The next question is whether there is anything in the act of extension to justify us in holding that there is an intention "plainly expressed" in it to make the rights and privileges therein extended irrevocable. The act of extension under consideration in the case of Franklin County *v.* Deposit Bank, *supra*, was the first act of extension, which was quite elaborate and contained many new conditions; but the one we have to consider is a simple extension without new conditions, except that it shall be formally accepted by the bank. We are unable to perceive any plain expression of the intention of the legislature to make the rights and privileges granted irrevocable. They are granted for twenty years, and without the rule of construction enjoined in the act of 1856, this would
273 be held to imply an intention that they should not be subject to amendment or repeal during that period. But the

act of 1856 was passed for the precise purpose of avoiding the usual implication and of requiring affirmative language to sustain the claim, that rights and privileges granted for any length of time could not be revoked before its expiration. Griffin *v.* Kentucky Ins. Co., 3 Bush, 592; Cumberland & Ohio Railroad Co. *v.* Barren County Court, 10 Bush, 609. We find no such affirmative language in this act. We cannot attach the significance that counsel do to the passage of two acts, extending the charter of the Northern bank, the one containing an express reservation, and the other enacted two years later omitting it. Each act must be construed as it stands, and in the absence of something affirmative in the latter act itself to exclude the act of 1856, it is to be treated as part thereof. This conclusion makes it unnecessary for us to consider the soundness of the proposition that, upon repeal of the Hewitt act, those who had surrendered exemptions were entitled to a restoration of them.

We come, then to the question: Did the Hewitt act confer on the banks accepting it a contractual immunity from taxation incapable of repeal during their corporate existence? The first section of the article of the Hewitt act provided that shares of stock in State and national banks, and other institutions of loan and discount, and in all corporations required by law to be taxed on their capital stock should be taxed seventy-five cents a share, and upon all surplus over and above 10 per cent. on their capital stock the same rate of taxation as was assessed upon real estate which, it was declared,
274 should be in full of all tax, State, county and municipal. The fourth and remaining sections of the article we give below:

"SECTION 4. That each of said banks, institutions and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the governor of this Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such bank.

"SECTION 5. The said banks may take the proceeding authorized by section 4 of this act at any time until the meeting of the next General Assembly: Provided, they pay the tax provided in section 1 from the passage of this act.

"SECTION 6. This act shall be subject to the provisions of section 8, chapter 68 of the General Statutes.

"SECTION 7. If any bank, State or national, shall refuse or fail to pay the tax imposed by this act, or shall fail or refuse to
275 make the consent and agreement as prescribed in section 4, the shares of stock of such bank, institution or corporation,

and its surplus, undivided accumulations and undivided profits, shall be assessed as directed by section 2 of this act, and the same taxes—State, county and municipal—shall be imposed, levied and collected upon the assessed shares, surplus, undivided profits and undivided accumulations as is imposed on the assessed taxable property in the hands of individuals: Provided, that nothing herein contained shall be construed as exempting from taxation for county or municipal purposes any real estate or building owned or used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed."

Section 8, chapter 68, of the General Statutes, referred to in section 6, *was the above act of 1856.*

But for the respect we feel for the judgment of the majority of the court of appeals, deciding the Bank-tax cases, 97 Ky., 591, and the very able opinion of Chief Justice Pryor in support of that judgment, we should have thought that there could be no doubt of the necessary construction of the article of the Hewitt act, above quoted. The act of 1856 is incorporated in the article of the Hewitt act above quoted, not merely by a rule of construction enjoined by a preceding legislature, and presumably accepted by the legislature passing the Hewitt act, but the latter legislature has expressly and affirmatively adopted it *as part of the article.*

It is said, however, that the sixth section was not intended
276 to apply at all to the contract of limited tax exemption contained in the fourth section, but that its purpose is to be found in, and limited to, the desire of the legislature to secure to itself the right to repeal the act before the acceptance of its terms by the banks. The suggestion seems to us utterly inadequate to explain the insertion of the section in the act. All the banks were required to accept the act before the next meeting of the legislature, so that the right to repeal must, in this view, have been limited to the short time remaining of the pending session of the legislature, and the interval when the legislature was not in session. With submission, a construction limiting the reservation clause to so inconsequential a purpose is unreasonable. Since the decision by the Supreme Court in State Bank *v.* Knoop, 16 How., 369, in 1853, that a State might restrict its taxing power over a corporation by charter provisions in the nature of a contract which was irrevocable, the main object of the clause reserving a power in the legislature to alter or repeal charters and acts of incorporation has been to render the tax exemption revocable, and it is to miss wholly the significance of such a clause to hold that it has no application to a tax limitation, *when it is expressly made part of the act declaring such limitation.* It would be extremely difficult for a court, bound to follow the decisions of the Supreme Court of the United States, to hold that a clause of an act expressly reserving in the legislature the right to amend or repeal it does not apply to tax exemptions conferred by the same act. In Tomlinson *v.* Jessup, 15 Wall., 454, an act of
South Carolina provided that every charter or incorporation
277 granted or renewed should, at all times, be subject to amendment, alteration or repeal, unless the granting or renewing

act should, in express terms, provide otherwise. The question was, whether this applied to a tax exemption of the property of a company which was in terms to last during the continuance of the existing charter. The Supreme Court held that it did. Mr. Justice Field said, in delivering the opinion of the court:

"There is no subject over which it is of greater moment for the State to preserve its power than that of taxation. It has, nevertheless, been held by this court, not, however, without occasional earnest dissent from a minority, that the power of taxation over particular parcels of property, or over property of particular persons or corporations, may be surrendered by one legislative body, so as to bind its successors and the State. * * * In these cases, and in others of a similar character, the exemption is upheld as being made upon considerations moving to the State which give to the transaction the character of a contract. It is thus that it is brought within the protection of the Federal Constitution. In the case of a corporation, the exemption, if originally made in the act of incorporation, is supported upon the consideration of the duties and liabilities which the corporators assume by accepting the charter. When made, as in the present case, by an amendment of the charter, it is supported upon the consideration of the greater efficiency with which the corpora-
278 tion will thus be enabled to discharge the duties originally assumed by the corporators to the public, or of the greater facility with which it will support its liabilities and carry out the purposes of its creation. Immunity from taxation, constituting in these cases a part of the contract with the Government, is, by the reservation of power such as is contained in the law of 1841, subject to be revoked equally with any other provision of the charter whenever the legislature may deem it expedient for the public interests that the revocation shall be made. The reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges and immunities derived by its charter directly from the State. Rights acquired by third parties and which have become vested under the charter, in the legitimate exercise of its powers, stand upon a different footing, but of such rights it is unnecessary to speak here. The State only asserts in the present case the power under the reservation to modify its own contract with the corporators; it does not contend for a power to revoke the contracts of the corporation with other parties, or to impair any vested rights thereby acquired."

The "reservation" clause has been applied to tax-exemption privileges in accord with the doctrine above declared in Railroad Company *v.* Georgia, 98 U. S., 359, and Hoge *v.* Railroad, 99 U. S., 348.

The court of appeals of Kentucky in the Bank-tax cases relied much on the case of New Jersey *v.* Yard, 95 U. S., 104. In
279 that case the question was whether a tax exemption was subject to repeal under a general reservation act. The railroad company which was claiming the exemption had been organized in 1835 before the passage of the reservation act. A supplement was passed expressly reserving the power of appeal. A second supple-

ment without any reservation was passed. This second supplement related to a tax controversy and provided for the settlement of it by written acceptance by the railroad company. It was held that the general reservation act did not apply to a limited tax exemption granted to the company in this supplement. The court pointed out that general acts of reservation passed by one legislature are binding on a subsequent legislature only so far as it chooses to conform to them, and that it is a question in every case whether the legislature making a contract intends the former reservation act to become by implication a part of the contract. In the case before the court it was held that the provision for specific rate of taxation was inconsistent with such an implication because there was a fair adjustment of a subject of dispute for a valuable consideration on both sides, because the contract assumed the shape of a formal written contract, and because of the scope of the words of the contract, which were that "this tax shall be in lieu and satisfaction of all other taxation or imposition whatsoever by or under the authority of this State or any law thereof." Were it not for the sixth section of the Hewitt act, the case would have a most important bearing in considering whether the legislature passing the Hewitt act in-
280 tended that the act of 1856 should be incorporated by implication in the Hewitt act. But that which was a matter of inference and argument in New Jersey *v.* Yard, is in the case before us determined by the express declaration of the legislature passing the Hewitt act. Those circumstances and that language of the act under consideration which were regarded in the Yard case as inconsistent with an implication that the general reservation act should be read into it, cannot prevail against the express direction by the legislature that the reservation act must be applied to it. It is as the Supreme Court declares it to be, only a question of legislative intention, and when the intention is expressly declared there is no room for implication.

The fourth section of the Hewitt act, construed in the light of the reserved power of repeal in the sixth section, was a proposal to the banks that they should pay a certain tax and no more during their corporate existence unless the legislature should see fit sooner to withdraw from the agreement. The question is asked why the old banks should surrender their charter right to a lower tax assessment for the rate fixed under the Hewitt act if it is true that the legislature could withdraw from it at pleasure. It is a sufficient answer to say that they had in fact no irrevocable exemption to surrender, and though they claimed it, and had then the decision of a State circuit court upholding the claim, it was so doubtful that they preferred to accept a somewhat higher rate of taxation by the State alone than to run the risk of being subjected to the much heavier taxation, both State and local, imposed by the sev-
281 enth section of the Hewitt act upon banks which should not accept the proposal of the fourth section.

Having concluded that the act of 1856 must be applied to the fourth section, the question remained whether the tax exemption, after acceptance by the banks, was a "right previously vested"

within the proviso of that act. If so, it cannot be impaired. The court of appeals held that it was such a right. We cannot concur in this view. It seems to us that the legislature in this proviso was merely expressing in words the limitation that always exists upon the reserved power of amendment or repeal of corporate charters. A legislature cannot by amendment or repeal of a charter deprive the member of a corporation of the property or contract rights it has acquired by the exercise of its corporate powers. Commonwealth *v.* Essex Co., 13 Gray, 239; Miller *v.* State, 15 Wall., 478; Sage *v.* Dillard, 15 B. Mon., 349; Holyoke Company *v.* Lyman, 15 Wall., 478. It cannot annul contracts made by the corporation with third persons in the exercise of its lawful franchises. It cannot undo that which is done. It cannot say that that does not exist which does in fact exist. It cannot recall an executed grant of property. But it can revoke for the future anything in the charter of a promissory character, whether it is contractual or merely gratuitous. In Greenwood *v.* Freight Co., 105 U. S., 13, 19, the question was of the effect of the repeal of an act conferring a charter upon a street railway company that had built its track in the streets. Mr. Justice Miller, speaking for the court, said:

"If the essence of the grant of the charter be to operate a
282 railroad and to use the streets of the city for that purpose,
it can no longer so use the streets of the city, and no longer exercise the franchise of running a railroad in the city. In short, whatever power is dependent solely upon the grant of the charter and which could not be exercised by unincorporated private persons under the general laws of the State is abrogated by the repeal of the law which granted these special rights."

See also State *v.* Miller, 21 Barb.; Zabriskie *v.* H. & N. R. R. Co., 18 N. J. Eq., 175; Oldtown *v.* Lincoln R. R. Co. *v.* Veazie, 39 Me., 571; Hathorn *v.* Calef, 2 Wall., 10–24; Commonwealth *v.* Essex Co., 13 Gray, 239. The limited tax exemption under the Hewitt act was a contract between the bank and the State. The reserved right to repeal made the contract one which the State could revoke at pleasure. The court of appeals in the bank-tax cases relied on the Commissioners of the Sinking Fund *v.* Green & Barren River Navigation Co., 79 Ky., 73. In that case it was decided that the legislature could not, under the act of 1856, take from the navigation company, without making compensation therefor, the right it had acquired under a contract with the State to take for a term of years tolls from vessels navigating the Green and Barren rivers in consideration of its agreement, then fully performed, to put in repair and maintain at its own expense the line of navigation. It may be hard to reconcile this case with Greenwood *v.* The Freight Company, but it can be distinguished from the case at bar. In the case cited the court
treated the right which the State proposed to exercise as a re-
283 served right of re-cission and held that it could only be exercised on condition that the grantee of the State should receive compensation for the money advanced to improve the property of the State the use of which he was not permitted to enjoy. In the case at the bar, banks surrendered nothing of value to the State for the limited

tax exemption of the Hewitt act, and the power of revocation was not in any view, therefore, trammelled by conditions.

In view of our conclusion that the complainant has not established, as against any of the defendants, except Bourbon County, the existence of an irrevocable contract of tax exemption, either by *res judicata* or on the merits, and as this issue thus presented and decided is the only one upon which complainant, a corporate citizen of Kentucky, can ask a Federal court for relief, we do not pass upon or decide the question raised by complainant under the State decisions whether prior decisions of the court of appeals, though now overruled, prevent the collection of taxes accruing during those years when the prior decisions holding them uncollectible and void remained unreversed.

For the reasons given the order of the court will be that the motion for an injunction against Bourbon county and the certification of the assessment to it by the board of valuation is granted and to this extent the demurrers to the bills are overruled. But as to the certifications of the assessment to the other municipalities the demurrers are sustained and the bill dismissed.

284 *Opinion. No.* 6556.

Circuit Court of the United States, District of Kentucky.

PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF Kentucky
vs.
CITY OF LOUISVILLE. } No. 6556.

Before Harlan, circuit justice, and Taft and Lurton, circuit judges.

TAFT, circuit judge, delivered the opinion of the court:

The bill filed herein presents the same questions as those already considered in the case of The Bank of Kentucky *v.* Samuel H. Stone, etc., but it relates to the taxes for 1893–'94, which were certified down by the State board of valuation and assessment to the city of Louisville for collection. We do not think that the questions differ in any respect from those already considered, and must, therefore, hold that the city of Louisville is estopped by the former judgment between the Bank of Kentucky and it, in which it was held by the court of appeals of Kentucky that the Bank of Kentucky had an irrevocable contract under the Hewitt act for the exemption of the property and franchise of the Bank of Kentucky from any other taxation than as therein imposed; and, therefore, that the bank is entitled to the preliminary injunction against the collection by the city of Louisville and its agents of the taxes provided in the revenue act of November, 1892.

The demurrer to the bill is overruled, and the motion for an injunction granted.

285 *Opinion. No.* 6562.

Circuit Court of the United States, District of Kentucky.

LOUISVILLE BANKING COMPANY
vs.
CITY OF LOUISVILLE. } No. 6562.

Before Harlan, circuit justice, and Taft and Lurton, circuit judges.

TAFT, circuit judge, delivered the opinion of the court.

This case presents the same questions as are presented in the case of The Louisville Banking Co. *v.* Samuel H. Stone, etc., already disposed of, but involves the taxes for 1893 and 1894. The taxes for 1895, 1896, 1897 and 1898 were involved in the prior case.

The order will be that the preliminary injunction prayed for shall issue, and that the demurrers to the bills be overruled.

Opinion. No. 6561.

Circuit Court of the United States, District of Kentucky.

LOUISVILLE BANKING CO.
vs.
SAMUEL H. STONE, ETC. } No. 6561.

Opinion. No. 6562.

LOUISVILLE BANKING CO.
vs.
CITY OF LOUISVILLE. } No. 6562.

Before Harlan, circuit justice, and Taft and Lurton, circuit judges.

TAFT, circuit judge, delivered the opinion of the court:

286 These cases present substantially the same questions as those already passed upon in the case of the Bank of Kentucky against the same defendants. The complainant company was a corporation organized after the act of 1856, but before the Hewitt act. It duly accepted the provisions of the Hewitt act. After the passage of the revenue act of November, 1892, and the adoption of the ordinance by the city of Louisville imposing a license upon the gross receipts of banks doing business within its limits, a warrant was sued out by the city of Louisville in its police court against the Louisville Banking Company for a failure to pay the license. This bank filed a petition for a writ of prohibition in the circuit court of Jefferson county against R. H. Thompson, the police judge, averring that the ordinance of the city of Louisville was void as impairing an obligation of the complainant's contract

with the State under the Hewitt act, and that any authority given to the city of Louisville to pass such ordinance by the revenue act of November, 1892, was likewise void as impairing the obligation of the contract. The petition prayed that the police judge might be prohibited from taking jurisdiction of the proceeding against complainant for a violation of the ordinance. Issue was joined on this petition by the defendant, The Judge of the Police Court of the City of Louisville. The City of Louisville, though not a party in name, was, in reality, the party defendant, and appeared by counsel. Indeed, the proceedings, were taken for the purpose of testing the validity of the license ordinance by agreement between the city attorney and the complainant bank. The Jefferson circuit court found the issues in favor of the defendant and entered a
287 decree dismissing the petition. Thereupon the complainant banking company caused an appeal to be taken in its name from the judgment of the Jefferson circuit court of appeals, and to that appeal it made the City of Louisville and R. H. Thompson, the police judge, parties. In the court of appeals the cause was argued by the counsel for the City of Louisville. The court of appeals reversed the judgment of the Jefferson county circuit court, and in its opinion held that the ordinance of the city of Louisville was void, for the reason that the Louisville Banking Company had an irrevocable contract with the Commonwealth upon its due acceptance of the terms of the Hewitt act, limiting the amount of taxes to which it was subject to those imposed by that act during its corporate existence.

For the reasons already stated in the case of the Bank of Kentucky against the same defendants, we think it conclusively established, as between the parties by a former adjudication, that the complainant had an irrevocable contract under the Hewitt act with the Commonwealth of Kentucky, by which no greater taxes than therein provided could be imposed upon it by the Commonwealth or under its authority.

For the reasons stated in the same opinion, we think the complainant entitled to equitable relief to prevent a violation of that contract by the taxes assessed under the revenue act of 1892. An order for a preliminary injunction, therefore, must issue in these cases, and the demurrers to the bills must be overruled.

288 *Opinion. Farmers' Bank Case.*

Circuit Court of the United States, District of Kentucky.

THE FARMERS' BANK OF KENTUCKY
vs.
SAMUEL H. STONE and Others.

Before Harlan, circuit justice, and Taft and Lurton, circuit judges.

TAFT, circuit judge, delivered the opinion of the court.

This case is controlled by the points already decided. The Farmers' bank, in prior adjudications with the county of Franklin, the

city of Frankfort and the city of Henderson, was conclusively adjudged to have an irrevocable contract under the Hewitt act, exempting it from any taxation in excess of that provided therein. There was no such adjudication, however, between the Farmers' bank and either Scott county or Henderson county. It therefore follows, from what has already been decided, that as to Scott county and Henderson county, the demurrers to the bill should be sustained, and the bill must be dismissed; while as to the other defendants, the demurrers will be overruled and the motions for a preliminary injunction granted.

Opinion. No. 275.

Circuit Court of the United States, District of Kentucky.

THE DEPOSIT BANK OF FRANKFORT
vs.
SAMUEL H. STONE and Others. } No. 275.

Before Harlan, circuit justice, and Taft and Lurton, circuit judges.

289 TAFT, circuit judge, delivered the opinion of the court:

In an injunction suit brought by the Deposit Bank of Frankfort against the County of Franklin, in the Franklin circuit court, to prevent the collecting of any taxes under the revenue act of 1892, in excess of those imposed by the Hewitt act, it was expressly adjudged on appeal by the court of appeals that the bank had, by its due acceptance of the terms of the Hewitt act, an irrevocable contract of exemption from taxation in excess of that imposed in the Hewitt act, and that the revenue act of 1892 violated this contract. In a similar injunction brought by the bank against the City of Frankfort, a decree, in all respects similar, was entered on the same ground. In accordance with our decision, in the case of Bank of Kentucky against Stone, just decided, we must, therefore, grant the motion for a preliminary injunction, and overrule the demurrer to the bill.

Opinion. No. 6573.

Circuit Court of the United States, District of Kentucky.

THIRD NATIONAL BANK, Complainant,
vs.
SAMUEL H. STONE, CHARLES FINLEY, G. W. LONG, and The City of Louisville, Defendants. } No. 6573.

Opinion. No. 6574.

THIRD NATIONAL BANK, Complainant,
vs.
THE CITY OF LOUISVILLE, Defendants. } No. 6574.

Before Harlan, circuit justice, and Taft and Lurton, circuit
290 judges.

TAFT, circuit judge, delivered the opinion of the court:

These cases present the same question which arose in the case of the Louisville Banking Company against the same defendants already decided. The suit against the City of Louisville relates to the taxes under the revenue act of 1892, for the years 1893 and 1894, and the suit against Stone and others and the City of Louisville relates to the taxes for 1895, 1896, 1897 and 1898. In the prohibition suit brought by The Third National Bank against The Judge of the Police Court, to which the City of Louisville became a party on appeal, it was held by the court of appeals of Kentucky that the Third National Bank, by its formal acceptance of the provisions of the Hewitt act, had acquired a contract right irrevocable by the State exempting it from all taxes except those provided under the Hewitt act, and that the license tax imposed by the city of Louisville under a statute of the State was, therefore, a violation of the contract, and void under the Constitution of the United States.

The demurrer to the bills are therefore overruled, and the motions for preliminary injunction against the defendants are granted.

291 *Opinion. No. 6565.*

Circuit Court of the United States, District of Kentucky.

LOUISVILLE CITY NATIONAL BANK *vs.* SAMUEL H. STONE and Others. } No. 6565.

Opinion. No. 6566.

LOUISVILLE CITY NATIONAL BANK *vs.* CITY OF LOUISVILLE. } No. 6566.

Before Harlan, circuit justice, and Taft and Lurton, circuit judges.

TAFT, circuit judge, delivered the opinion of the court:

These cases are controlled by the case of Bank of Commerce against City of Louisville. On the principle of privity and *res judicata* laid down in that case, we grant the motion for a preliminary injunction and overrule the demurrer to the bill.

Said replication to the answer of defendants, filed herein on June 25th, 1898, is as follows, viz:

Replication.

Circuit Court of the United States, for the Sixth Circuit and District of Kentucky.

DEPOSIT BANK OF FRANKFORT, Complainant, *vs.* SAMUEL H. STONE ET AL., Defendants. } No. 275. Replication.

The replication of Deposit Bank of Frankfort, complainant, to the answer of Board of Councilmen of the City of Frankfort and County of Franklin, defendants.

292 This repliant, saving and reserving unto itself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says that it will aver, maintain, and prove its said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answers of the said defendants are uncertain, untrue and insufficient to be replied to by this repliant; without this, that any other matter or thing whatsoever in the said answers contained material or effectual in the law to be replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by *his* said bill *as he* has already prayed.

____ ____,

Complainant's Solicitor.

Said supplemental answer tendered by defendants herein on June 25th, 1898, and made a part of this record, is in the following words and figures, viz:

Supplemental Answer.

Circuit Court of the United States for the Sixth District of Kentucky.

DEPOSIT BANK OF FRANKFORT
vs.
SAMUEL H. STONE, CHARLES FINLEY, G. W. LONG, City of Louisville, County of Franklin, and Board of Councilmen of the City of Frankfort. } In Equity.

293 Supplemental answer of the above-named Board of Councilmen of the City of Frankfort, one of the defendants, to the bill of complaint of the above-named Deposit Bank of Frankfort.

Reiterating its original answer to the said bill, and without waiving demurrer to the jurisdiction or its general demurrer to the bill, but reiterating and relying upon the same, the Board of Councilmen of the City of Frankfort, for supplement to its original answer to the said bill, says as follows:

On January 14th, 1898, the Board of Councilmen of the City of Frankfort filed in the clerk's office of the Kentucky court of appeals a certified copy of the judgment of the Franklin circuit court rendered on February 1st, 1896, in the case of The Board of Councilmen of the City of Frankfort against the Deposit Bank of Frankfort (set forth on pages 58, '9 of the printed record herein and relied upon by complainant bank as conclusive of this defendant's rights herein), and prayed an appeal from said judgment to the court of appeals of Kentucky, which appeal was granted and process thereon to Franklin county was issued by the clerk of said court of appeals on January 14th, 1898, which process (summons) was duly executed by the sheriff of Franklin county upon complainant bank on January 14th, 1898. By said summons the complainant bank was duly notified of the pendency of said appeal and was thereby warned to appear before said court of appeals at its then approaching April term (1898) and show cause why said judgment of the Franklin circuit court should not be reversed for errors therein contained.

294 Said appeal is now pending in the Kentucky court of appeals, and will be duly prosecuted to decision in said court by this defendant; the same will stand for hearing in said court of appeals at its next September term.

A certified copy of the said proceedings in the Kentucky court of appeals for reversal and vacation of said judgment is attached hereto and filed herewith as part hereof. Further answering, this defendant says the said judgment was and is void because same is not supported by the pleadings. It purports to be a judgment for

injunction when there was no suit for injunction. Besides, same leaves the case undisposed of and pending in the Franklin circuit court.

This defendant, Board of Councilmen of the City of Frankfort, submits that there is no equity in the bill; that the injunction prayed for ought not to be granted, and that this court will not exercise jurisdiction of the cause, and prays that this bill be dismissed with costs.

IRA AND W. H. JULIAN,
Att'ys for City of Frankfort.

T. HITER CROCKETT, *City Att'y.*

The undersigned, W. S. Dehoney, says that he is the duly elected and qualified and acting mayor of the city of Frankfort, Ky., and that the statements of the foregoing supplemental answer of the board of councilmen of said city are true.

W. S. DEHONEY, *Mayor.*

Subscribed and sworn to before me by W. S. Dehoney, mayor of the city of Frankfort, on this 21st day of June, 1898.

GUY H. BRIGGS,
Ex. Franklin Co.

295 Said exhibit tendered with supplemental answer of the Board of Councilmen of the City of Frankfort is in words and figures as follows, viz:

EXHIBIT.

Record from Court of Appeals of Kentucky in Case of Board of Councilmen of the City of Frankfort *v.* Deposit Bank.

COMMONWEALTH OF KENTUCKY:

Pleas before the honorable judges of the court of appeals of Kentucky.

Court of Appeals of Kentucky.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Appellant,
vs.
DEPOSIT BANK OF FRANKFORT, Appellee.

Be it remembered that heretofore, to wit: on the 14th day of January, 1898, the appellants filed in the clerk's office of said court a copy of a judgment which is in words and figures following:

Judgment.

Filed Feb'y 1st, 1896.

Franklin Circuit Court.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Plaintiff,
vs.
DEPOSIT BANK OF FRANKFORT, Defendant. } Judgment.

It appearing to the court that this action has been continued and not heretofore submitted, by agreement between the plaintiff and defendant, by their respective attorneys, that this action should stand upon the answer filed by the defendant until the decision by
296 the court of appeals in the two cases appealed from this court, in one of which the defendant bank was plaintiff and The County of Franklin, &c., were defendants, and in the other The Commonwealth for the use of said county was plaintiff and the defendant bank was defendant, and the liability of the bank for the taxes claimed in this case should be settled and determined by the decision of the court of appeals in said two cases, the defense relied on in this case being the same contract set up and relied upon by the bank in those two cases; and it further appearing to the court by the mandates and opinions of the court of appeals filed in said two cases, that the court of appeals has sustained the defense set up and relied on by the bank in said two cases based upon the contract made by the bank under the Hewitt bill, which is the same contract relied on as a defense in this case, it is now ordered and adjudged that art. 2 of the act of the General Assembly entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17th, 1886 (Gen. Statutes, chap. 92, art. 2), and the acceptance of the provisions thereof by defendant, constituted a contract between the plaintiff and the Commonwealth which the latter cannot alter or change without the consent of the former; by the terms of which contract the defendant cannot, during the continuance of its charter, be assessed for taxation or taxed for State purposes in a different mode or at a greater rate of taxation than as provided for in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon any real estate it may own; that the provisions of the present constitution of this
297 State and of the act of Nov. 11th, 1892 (art. 3, chap. 103, Acts 1891-'2-'3), in so far as they are intended to provide for any assessment or taxation of the defendant's property, right of property, or franchise, except its said real estate, are in violation of and repugnant to the Federal Constitution and void; that the board of valuation and assessment provided for in said act of Nov. 11th, 1892, had and has no authority in law to assess or value the defendant's franchise for taxation, or the auditor to appoint or certify the same or any part of the same for county or municipal taxation; that the tem-

porary injunction which was prayed for in this cause at the commencement of the action be, and the same is now hereby, granted, and the defendants and each of them are perpetually enjoined and restrained from levying upon or selling any property of the defendant for the purpose of collecting any taxes for the city of Frankfort upon the franchise or property of the defendant, except upon its real estate; and it is further adjudged that the defendant recover of the plaintiff its costs in this action expended.

To all of which the Board of Councilmen of the City of Frankfort except, and pray an appeal to the court of appeals, which is granted.

A copy.

Attest:

THOS. B. FORD, *Clerk*,
By J. R. ELLIOTT, *D. C.*

(Upon the filing of said copy of judgment the appellants, by counsel, endorsed thereon the following statement, to wit:)

298 *Statement.*

Court of Appeals, Kentucky.

BOARD OF COUNCILMEN OF THE CITY OF Frankfort, Appellant,
vs.
DEPOSIT BANK OF FRANKFORT, Appellee. } Application for Appeal.

The foregoing judgment of the Franklin circuit court was rendered on February the 1st, 1896.

The Board of Councilmen of the City of Frankfort now comes and prays the clerk of the court of appeals for an appeal from said judgment to the court of appeals.

W. H. JULIAN,
Att'y for Appellant.
T. H. CROCKETT, *City Att'y.*

(Whereupon an appeal was granted in accordance with said statement, and the following summons issued:)

Summons on Appeal.

The Commonwealth of Kentucky to the sheriff of Franklin county, Greeting:

We command you to summon Deposit Bank of Frankfort to appear before the judges of the court of appeals of Kentucky, at the capitol, in Frankfort, on the first day of their next April term, to show cause, if any it can, why a judgment obtained by it in the Franklin circuit court against Board of Councilmen of City of Frankfort, at its Jan'y term, 1896, should not be reversed for the errors therein contained, as we from its complainant are informed; and have then and there this writ.

299 Witness A. Addams, clerk of our said court, at the capitol aforesaid, this 14th day of January, 1898.

A. ADDAMS, *C. C. A.*,
By ROB'T L. GREENE, *D. C.*

(Here is the officer's return on the foregoing summons:)

Executed on the Deposit Bank of Frankfort by delivering to B. C. Milem, president of said bank, a true copy of the within summons January the 15th, 1898.

B. F. SUTER, *S. F. C.*,
By P. C. TOWLES, *D. S.*

Clerk's Certificate.

COMMONWEALTH OF KENTUCKY:

I, Abram Addams, clerk of the Kentucky court of appeals, do certify that the foregoing is a full and complete transcript of the proceedings had upon copy of judgment in the case wherein The Board of Councilmen of the City of Frankfort are appellants and The Deposit Bank of Frankfort is appellee, as shown by the records of my office.

In testimony whereof I have hereunto set my hand and affixed the seal of my office.

Done at Frankfort, Kentucky, this the 10th day of June, A. D. 1898.

ABRAM ADDAMS,
[SEAL.] *Clerk Ky. Court of Appeals.*

300 Said petition for appeal and assignment of errors, filed herein on June 25th, 1898, is in words and figures as follows, viz:

Petition for Appeal.

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

THE DEPOSIT BANK OF FRANKFORT, Kentucky, Complainant,
vs.
SAMUEL H. STONE ET AL., Defendants.
} Petition for Appeal and Assignment of Errors.

The defendants, Samuel H. Stone, auditor; Charles Finley, secretary of state, and G. W. Long, treasurer of the Commonwealth of Kentucky, The Board of Councilmen of the City of Frankfort, Kentucky, and The County of Franklin, conceiving themselves aggrieved by the decree made and entered on the 25th day of June, 1898, in the above-entitled cause, do hereby appeal from the said order and decree of the United States Supreme Court for the reasons specified in the assignment of errors which is filed herewith, and they pray that this appeal may be allowed, and that the transcript

of the record, proceedings, and the papers upon which said order was made, duly authenticated, may be sent to the United States Supreme Court.

And the said defendants further say that said decree is erroneous and against the just rights of said defendants for the following reasons:

First. Because the court erred in overruling the demurrers of each of said defendants to the complainant's petition.

Second. Because the court erred in overruling the plea of
301 the Board of Councilmen of the City of Frankfort, the County of Franklin, to the jurisdiction herein.

Third. Because the court erred in refusing to permit defendant The Board of Councilmen of the City of Frankfort to file the amended answer offered by them herein on the 25th day of June, 1898.

Fourth. Because the court erred (after deciding that complainant did not have any irrevocable contract under and by virtue of article 2 of the act of the General Assembly of the Commonwealth of Kentucky entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17th, 1886) in adjudging and decreeing, nevertheless, that by reason of the several pleas of *res judicata* relied on by complainant in its bill the complainant has established a contract with the Commonwealth of Kentucky under the provisions of the act aforesaid.

Fifth. Because the court erred in enjoining and restraining the defendants Samuel H. Stone, auditor; Charles Finley, and George W. Long from proceeding to value the franchise of the complainant under the act of November 11th, 1892, for the years 1895, 1896, 1897, and 1898, and for all subsequent years until the expiration of complainant's charter, and also erred in enjoining and restraining the County of Franklin and the Board of Councilmen of the City of Frankfort from endeavoring to collect any tax upon any valuation from the complainant, and also erred in adjudging that complainant by making payment of taxes to the State only in accordance with the Hewitt law, is discharged in full from all taxes, and also erred in adjudging that the present constitution of Kentucky
302 and the act of November 11th, 1892, in so far as intended to provide or do provide for any assessment or taxation of complainant's property, rights of property, or franchise except under said Hewitt bill, are repugnant to the Federal Constitution and void.

Wherefore the defendants pray that the said decree be reversed, and that the said court may be directed to enter a decree in accordance with the prayer of defendants' answer herein.

W. S. TAYLOR, *Att'y Gen'l for Ky.*
T. HITER CROCKETT, *City Att'y.*
IRA AND W. H. JULIAN, *Attorneys.*
JAS. H. POLSGROVE,
Co. Att'y, Franklin Co.

And on a day following, to wit: on the 22nd day of July, 1898, an appeal bond was filed herein, which was and is in words and figures as follows, viz:

Bond on Appeal.

Appeal bond.

Know all men by these presents that Samuel H. Stone, auditor; Charles Finley, secretary of state; and G. W. Long, treasurer, of the Commonwealth of Kentucky; the Board of Councilmen of the City of Frankfort, Kentucky, and Franklin County, Kentucky, as principals, and J. S. Darnell, as surety, are held and firmly bound unto the Deposit Bank of Frankfort in the sum of one thousand ($1,000.00) dollars; — the payment of which, well and truly to be made, they bind themselves, their successors, administrators
303 and executors, jointly and severally, by these presents.

Done this 20th day of July, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas the above-named Samuel H. Stone, auditor; Charles Finley, secretary of state, and G. W. Long, treasurer, of the Commonwealth of Kentucky; the Board of Councilmen of the City of Frankfort, Kentucky, and Franklin County, Kentucky, have prosecuted an appeal to the Supreme Court of the United States to reverse a decree rendered by the circuit court of the United States for the district of Kentucky in the case of The Deposit Bank of Frankfort, complainant, *v.* Samuel H. Stone, *et al.*, defendants, numbered 275 on the docket of said court:

Now, therefore, the condition of this obligation is such that if the said Samuel H. Stone, auditor; Charles Finley, secretary of state, and G. W. Long, treasurer, of the Commonwealth of Kentucky; the Board of Councilmen of the City of Frankfort, Kentucky, and Franklin County, Kentucky, shall prosecute an appeal to effect and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

SAM'L H. STONE, *Auditor*, [SEAL.]
By W. H. JULIAN, *Att'y.*
CHAS. FINLEY, *Secret'y of State*, [SEAL.]
By W. H. JULIAN, *Att'y.*
GEO. W. LONG, *Treasurer*, [SEAL.]
By W. H. JULIAN, *Att'y.*
FRANKLIN COUNTY, [SEAL.]
By J. D. MOORE, *Judge.*
CITY OF FRANKFORT, [SEAL.]
By W. S. DEHONEY, *Mayor.*
J. S. DARNELL. [SEAL.]

304 Sealed and delivered and taken and acknowledged this 20th day of July, 1898, before me—

W. G. CHAPMAN,
Cl'k U. S. Cir. Court, Dist. of Ky., at Frankfort,
By CHAS. N. WIARD, *D. C.*

Approved by—
JOHN W. BARR,
Judge U. S. Dist. Judge.

Attached to the foregoing bond is the following affidavit of surety, viz:

UNITED STATES OF AMERICA, *District of Kentucky,* } ss:

J. S. Darnell, a surety on the annexed bond, being duly sworn, deposes and says that he resides at Frankfort, Kentucky, in the county of Franklin, in said district; that he is a freeholder in the State of Kentucky; that he is worth the sum of two thousand ($2,000.00) dollars over and above all his just debts and liabilities in property subject to execution and sale, and that his property consists of real and personal property.

J. S. DARNELL.

Subscribed and sworn to before me by J. S. Darnell this July 20th, 1898.

W. G. CHAPMAN,
Cl'k U. S. Cir. Court, Dist. of Ky., at Frankfort,
By CHAS. N. WIARD, *D. C.*

305 And on the same day, to wit: on July 22nd, 1898, the following stipulation was filed herein, viz:

Stipulation Waiving Citation and as to Record on Appeal.

U. S. Circuit Court for the District of Kentucky.

THE DEPOSIT BANK OF KENTUCKY, Complainant,
vs.
THE BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Ky., and Franklin County, Defendants. } Stipulation.

Citation on the appeal herein is waived, and it is agreed that the clerk in making the transcript for appeal herein may compare the printed record (used in this cause in the application for injunction before Judge Taft) with the record on file in his office and use said printed record, corrected where it is not the same as the original, and that the clerk may also use the printed opinion of Judge Taft herein without making special copy in the transcript for appeal.

Witness our hands this 13th day of July, 1898.

IRA AND W. H. JULIAN,
Att'ys for Defendants.
FRANK CHINN,
For Deposit Bank.

Clerk's Certificate.

UNITED STATES OF AMERICA, *District of Kentucky,* } *sct:*

I, Walter G. Chapman, clerk of the circuit court of the United States for the sixth judicial circuit and district of Kentucky, at Frankfort, do hereby certify that the foregoing 149 pages contain a full and true transcript of the record of the proceedings had
306 in this court wherein The Deposit Bank of Frankfort was the plaintiff and Samuel H. Stone, auditor, &c., were the defendants, except the opinions of Judges Pryor and Paynter, included in "Exhibit B" filed with the bill of complaint, as the same appear from the records and files of my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at my office, this July 21st, A. D. 1898.

[Seal Circuit Court, Ky. Dis., U. S. of America.]

WALTER G. CHAPMAN, *Clerk,*
By CHAS. N. WIARD, *D. C.*

Endorsed on cover: Case No. 16,972. Kentucky C. C. U. S. Term No. 387. Samuel H. Stone, auditor; Charles Finley, secretary of state, & G. W. Long, treasurer, of the Commonwealth of Kentucky, *et al.*, appellants, *vs.* The Deposit Bank of Frankfort. Filed September 1st, 1898.

Franklin Circuit Court.

I, Thos. B. Ford, clerk of the Franklin circuit court, do certify that this is a true copy of the exhibit, made part of reply, in the case of Board of Councilmen of the City of Frankfort *v.* Deposit Bank of Frankfort, filed in Franklin circuit court, Feb. 1, 1901.

THOS. B. FORD,
Clerk Franklin Circuit —.

Fee for copy, $65.00.

307 Afterwards at a court of appeals held as aforesaid on the 21st day of May 1901, the following order was made herein: to wit,

Order for Motion for Continuance & Oral Argument.

Came the appellee by counsel and filed grounds and moved the court to continue this case and grant oral argument herein, which motions are submitted.

The grounds filed with the foregoing order are as follows:

Motion for Continuance and Oral Argument.

Court of Appeals.

BOARD OF COUNCILMEN OF CITY OF Frankfort, Appellant, *vs.* DEPOSIT BANK OF FRANKFORT, Appellee.	Motion for Continuance and Oral Argument.

The appellee moves the court to continue this case upon the ground that the record was not completed until the 14th day of May when the case was called on the docket. An incomplete record consisting of 23 pages was filed March 19th 1901 (the last day for appearance to this term) and when the case was called May 14th, appellant offered an additional transcript containing 123 printed pages which the court has allowed to be filed. Appellee was prepared to submit the case on the record as it was May 14th, but cannot properly prepare its case within the time allowed (June 1st) with this large additional record filed.

Appellee also moves the court to grant an oral argument in this case and makes the following statement of important legal questions involved in this appeal:

308 (1.) The effect of the former judgment of this court in this case, a *res judicata* of the issues raised on the present appeal:

(2.) What is a valid return of no property found by a tax collector upon which an action for discovery and attachment may be instituted against the tax debtor, as provided in sec. 3424 of Kentucky Statutes.

(3.) The tax collector has no authority to make that return under sec. 3422 until the end of his official term by the express terms of the statute, and no such return having been made in this case, the action was properly decided against appellant by the lower court.

(4.) The effect in this case of the judgment of the Supreme Court in the suit in that court between the same parties, in which it was decided that the appellee bank had established its contract under the act of May, 1886 with the State, and was not liable to the taxes imposed by the appellant, and that the act of 1892, under which the taxes in this case are sought to be imposed, in so far as it violates that contract, is repugnant to the Federal Constitution and void. That judgment being pleaded in bar of any recovery in this case.

Neither of these questions has ever been decided by this court so far as we have been able to find.

D. W. LINDSEY,
FRANK CHINN,
For Appellee.

309 Afterwards at a court of appeals held as aforesaid on the 22nd day of May, 1901, the following order was entered herein.

Order Sustaining Motion for Oral Argument.

The court being sufficiently advised, motion herein for oral argument is sustained and the case is ordered set for June the 6th, 1901.

Afterwards at a court of appeals held as aforesaid on the 6th of June, 1901, the following order was entered herein, to wit:

Order: Continuance.

It is ordered that this case be continued and set for argument in the September term.

Afterwards at a court of appeals held as aforesaid on the 26th day of September, 1901, the following order was entered herein to wit: This cause coming on to be heard was argued by Frank Chinn for appellee, and W. H. Julian for appellant and submitted.

Afterwards at a court of appeals held in and for the Commonwealth of Kentucky at the capitol in the city of Frankfort on the 19th day of November A. D. 1901, the following judgment was entered herein, to wit: (Chief Justice Paynter, Judges Burnam, Hobson and White sitting).

Judgment Court of Appeals.

BOARD OF COUNCILMEN OF FRANKFORT, Appellant, *vs.* DEPOSIT BANK OF FRANKFORT, Appellee.	Appeal from Franklin Circuit Court.

The court being sufficiently advised it seems to them the judgment herein is erroneous, it is therefore considered that said judgment be reversed and cause remanded for proceedings con-
310 sistent with the opinion herein. Which is ordered to be certified to said court. It is further considered that the appellant recover of appellee its cost herein expended.

On the same day, to wit: November 19th, 1901, the court delivered the following opinion herein:

Opinion.

Court of Appeals of Kentucky.

November 19th, 1901.

(To be reported.)

BOARD OF COUNCILMEN OF CITY OF FRANKFORT, Appellant, vs. DEPOSIT BANK OF FRANKFORT, Appellee. } Appeal from Franklin Circuit Court.

Opinion of the court by Chief Justice Paynter.

By this action the city of Frankfort seeks to recover taxes due for the years 1893 and 1894. It was filed in 1894 but no judgment was rendered until February, 1896, which sustained the appellee's defense that it had an irrevocable contract under the "Hewitt law" which gave it immunity from municipal taxation, the court following the opinion of this court delivered in June, 1895. Subsequently this court (17 Ky. Law Rep., 245) overruled its opinion, and under the latter opinion the appellee was liable for the taxes in question. An appeal was prosecuted from the judgment of February, 1896 to this court, which was reversed. (22 Ky. Law Rep., 466, 1384.)

Under the opinion of this court and the response to the pe-
311 tition for rehearing, all questions are *illiminated* from the case except the question as to whether the right to recover the taxes for the years in question is barred by a judgment of the Federal court in the proceeding wherein the appellee sought to and had enjoined in that court the collection of taxes due the city of Frankfort for the years 1895, 1896, 1897 and 1898. The Federal court held that the appellee had no contract rights with the State which relieved it from the payment of taxes to the city of Frankfort for the years last mentioned, but that by reason of the unreversed judgment of the Franklin circuit court, to which we have referred, rendered in February, 1896 in this case the appellant was barred from recovering the taxes for the years mentioned. That opinion was delivered before this court reversed the judgment. In the opinion reversing that judgment this court held that the defenses previously interposed were not good. The appellee thereupon filed an amended answer in which it pleaded the judgment of the Federal court as to the taxes for the years 1895, 1896, 1897 and 1898 as a bar to the appellant's right to recover for the years 1893 and 1894 which were sought to be recovered in this action. So we have this anomalous condition, the Supreme Court of the United States holding in the case mentioned that the appellee had no contract rights which gave it immunity from taxation to the city of Frankfort but that it was protected against the enforcement of the taxes for the years stated by reason of the unreversed judgment to which we have

alluded. The same effect must be given to the judgment of a Federal court as an estoppel as if it were the judgment of a State court.
312 The judgment having been reversed the foundation upon which the Federal court's judgment was based has been swept away by the opinion of this court. Had it been reversed previous to the judgment of the Federal court, then of course that court would not have held the city was estopped by the judgment from asserting its claim for the taxes for the years there in controversy. It would certainly be against reason and the doctrine of estoppel by judgment for this court to now hold that the judgment of the Federal court is a bar to a recovery in this action. It is not necessary for this court to hold, and it does not, (the question not being before it) that the bank is responsible for the taxes for the years involved in the Federal court proceeding. However, we do hold that the judgment of the Federal court is not a bar to a recovery of the taxes for the years 1893 and 1894.

This court in City of Newport *vs.* Commonwealth, 21 Ky. Law Rep., 42; Louisville Bridge Co. *vs.* City of Louisville, 22 Ky. Law Rep., 703, held that an adjudication as to one year's taxes is not a bar to a recovery in the litigation to any other year's taxes.

It is insisted by counsel for appellee that the Federal court not only held that the judgment of the Franklin circuit court in this case was a bar to a recovery for taxes for the years 1895, 1896, 1897 and 1898, but also a bar to the right of the city to assert a claim for taxes for other years, as the judgment of the circuit court sustained the claim of the appellee that it had an irrevocable contract under the "Hewitt law." This position might be taken with some
313 plausibility under recent rulings of the Supreme Court of the United States if the judgment in question had remained unreversed. It has not only been reversed but this court and the Supreme Court of the United States held that the bank did not have an irrevocable contract under the "Hewitt law." The rule of the Supreme Court with reference to the effect of such adjudications certainly could not apply to this case when the judgment which was the basis of its opinion is no longer in force. Should we sustain such a claim we would in effect allow the judgment that has been reversed to be pleaded as a bar to the cause of action alleged in the petition and held to be good in the opinion reversing the judgment.

Counsel for appellee argues that as the then unreversed judgment of the Franklin circuit court in this case was held by the Federal court to be a bar to the right to collect taxes for the years there in question, the judgment of the Federal court is a bar to the right of the city to collect taxes for the years here in question although the judgment held to be a bar has since been reversed by this court. A mere statement of the argument carries its refutation. The most that could be said as to the Federal court's judgment is that it, though based upon an erroneous judgment subsequently reversed, is a bar to the recovery for taxes for the years there in question. Certainly the judgment of the Franklin circuit court could operate as a bar to the city's rights only so long as it remained in force.

The judgment of the Federal court could not and did not prevent this court from reversing it. When reversed it is not available in this court or the Federal court as a bar to the rights of the
314 city to collect the taxes here claimed.

It follows from that the judgment of the circuit court must be reversed for proceedings consistent with this opinion.

T. H. Crockett, J. W. Rodman, Ira Julian, W. H. Julian, for appellant.
Frank Chinn, D. W. Lindsey, for appellee.

Afterwards at a court of appeals held as aforesaid on the 6th day of January, 1902, the following order was entered herein, to wit:

Appellee Files Petition for Rehearing.

Came appellee by counsel and filed a petition for rehearing and moved the court to grant a rehearing and the case is submitted on the motion and petition.

The following is the petition for rehearing filed in the clerk's office on the 21st of December, 1901, and submitted to the court on the 6th day of January, 1902, by the foregoing order.

315 1901, Dec. 21, filed in office.
Att.: S. J. SHACKELFORD, *C. C. A.*

Court of Appeals of Kentucky, September Term, 1901.

BOARD OF COUNCILMEN OF THE CITY — FRANKFORT, Appellant,
vs.
DEPOSIT BANK OF FRANKFORT, Appellee.

Petition for Rehearing.

Frank Chinn, D. W. Lindsey, counsel for appellee.
1902, Jan'y 6, filed.
Petition overruled.
Dissenting judges: Du Relle, Burnam, and O'Rear.

316 *Petition for Rehearing.*

Court of Appeals of Kentucky, September Term, 1901.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Appellant,
versus
DEPOSIT BANK OF FRANKFORT, Appellee.

Petition for rehearing.

Nothing short of a conviction of duty and the belief that the court is in error in reversing the judgment of the court below in this case, causes us to ask the court to consider this petition. Our belief

that the court is in error is strengthened by the fact that the previous arguments presented, while not satisfactory to the court, seem to have convinced the counsel for appellant, inasmuch as they have issued notice that they will apply to the Federal court for leave to file in that tribunal a bill of review, with the purpose of having set aside the judgment of that court relied upon in the supplemental answer in this cause.

With all due and proper respect we maintain that the action in the Federal court, in which the judgment was rendered which is relied upon as *res adjudicata* in this case, was not a suit for taxes for any year or years, as seems to have been the view of the court in the opinion, but had for its object the determination of the validity of
317 the act of November 11, 1892, under which appellee bank is sought here to be taxed, which was by the bill in that action assailed upon the ground that the act violated the clause of the Federal Constitution, which forbids a State to pass any law impairing the obligation of a contract. In this we do not see how we can be mistaken.

Taft, judge, in the opinion (page 71 of the printed exhibit of the Federal Court Record) states the scope and purpose of the bill in the Federal court in this language:

"The bill attacks the validity of the Kentucky revenue law of November, 1892, and seeks relief against its enforcement on the ground that in its application to the complainant bank, it violates that clause of the Federal Constitution which forbids the State to pass a law impairing the obligation of a contract." * * *

(Page 79.) "The complainant asserts that it has a contract with the Commonwealth in respect to taxation, the obligation of which the city of Louisville, the city of Frankfort and the county of Franklin, by the enforcement of a subsequent law of the State, are seeking to impair. The defendants deny the existence of such a contract, and we must determine whether, as between the parties, such a contract exists. It appears that as between the complainant and the defendants it has been conclusively adjudicated that such a contract exists. This relieves the court from re-examining that question as an original one between the present parties."

It is true that these expressions occur in the opinion in the
318 Bank of Kentucky case, but that opinion is in terms referred to in the short opinion of that court in the Deposit Bank case. (Exhibit, page 114.)

The decree of the U. S. circuit court, pleaded in the supplemental answer, which we here copy in full, from pages 63 and 64 of printed exhibit, is, we think, equally conclusive:

EXHIBIT.

Decree of U. S. Circuit Court.

DEPOSIT BANK OF FRANKFORT
vs.
SAMUEL H. STONE ET AL.

The court being sufficiently advised, files its opinion herein.

It is therefore adjudged, ordered and decreed as follows:

First. That the demurrer of the defendants Board of Councilmen of the City of Frankfort and Franklin County and of the defendants Samuel H. Stone, G. W. Long, and Charles Finley be, and the said demurrers are hereby, overruled; to which the said defendants each except.

Second. The plea of defendants Board of Councilmen of the City of Frankfort and Franklin County to the bill of complaint is overruled; to which the said defendants except.

Third. Thereupon came the complainant, by Frank Chinn, its counsel, and files its replication to the answer of the defendants, Board of Councilmen of the City of Frankfort and Franklin
319 County. The defendants, County of Franklin and City of Frankfort, offered to file an amended answer; to which complainant objected, and the motion to file is overruled; to which said defendants except, and said amended answer is made a part of the record by the order.

And by consent this cause came on to be heard for final decree. The complainant read upon hearing its bill of complaint and its amended bill of complaint herein, together with all the exhibits filed with said bills, to wit:

Exhibit "A," being the record of the proceedings in the case of Deposit Bank of Frankfort against Franklin County and John W. Gaines, sheriff.

Exhibit "B," being the records in the proceedings in the case of Deposit Bank of Frankfort against Franklin County and R. D. Armstrong, sheriff.

Exhibit "C," being judgment of Franklin circuit court, entered February 1st, 1896, in the suit of Deposit Bank of Frankfort against Franklin County.

Exhibit "D," being record of the proceedings in the case of Board of Councilmen of City of Frankfort against Deposit Bank of Franklin.

The defendant, The County of Franklin, read on the hearing its answer, and the defendant Board of Councilmen of the City of Frankfort read on the hearing the record of the proceedings in the case of Board of Councilmen of City of Frankfort against L. C. Norman, auditor, &c., and also read its answer.

320 And it is now adjudged, ordered and decreed that the defendants, Samuel H. Stone, Charles Finley and George W. Long be, and they are hereby, perpetually enjoined and restrained

from proceeding to value the franchise of the complainant until the act of November 11th, 1892, for the years 1895, 1896, 1897, 1898, or for any other subsequent years until the expiration of the charter of the complainant, and are enjoined and restrained from certifying such value to the county clerk of Franklin county or to any officer of the board of councilmen of the city of Frankfort or the county of Franklin and the defendants, County of Franklin and Board of Councilmen of the City of Frankfort, are enjoined and restrained from endeavoring to collect any tax upon any such valuations; and the complainant, by making payments in accordance with the Hewitt law, is discharged in full from all taxes to be exacted from it under any form or by any authority.

It is further adjudged, ordered and decreed that by reason of the several pleas of *res adjudicata*, relied on by the complainant in its bill and as shown by the exhibits therewith, the complainant has established a contract with the Commonwealth of Kentucky under the provisions of article 2 of the act of the General Assembly of the State of Kentucky, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17th, 1896, and the acceptance of the same by the complainant, the terms of which contract the Commonwealth cannot alter or change without the consent of the complainant; that by the terms of this con-
321 tract the complainant and its shares of stock cannot, during its corporate existence, be assessed for taxation for State purposes in a different mode or at a greater rate of taxation than as prescribed in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present constitution of the Commonwealth of Kentucky and the act of November 11th, 1892, in so far as they are intended to provide or do provide for any assessment or taxation of the complainant's property, rights of property, or franchise, or shares of stock, except to the extent and in the manner provided by sections 1, 2 and 3 of article 2 of the said act approved May 17th, 1886, and except to assess and tax for county and municipal purposes upon its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void.

And it is further adjudged that the complainant recover of the defendant its costs in this action expended.

And came defendants and prayed an appeal in open court and tendered their assignment of errors; whereupon the court allowed the appeal, and orders the assignment of errors to be filed and fixes the appeal bond at one thousand dollars.

(Signed) WM. H. TAFT,
Circuit Judge.

June 27, 1898.

By that decree it was adjudged that the provisions of the present constitution of the Commonwealth of Kentucky and the act
322 of November 11, 1892, in so far as they are intended to provide or do provide for any assessment or taxation of the

complainant's property, rights of property, or franchise, or shares of stock, except to the extent and in the manner provided by sections 1, 2 and 3 of article 2 of the said act approved May 17, 1886, and except to assess and tax for county and municipal purposes upon its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void.

In that decree it was adjudged that the complainant had established a contract, irrevocable except by its consent, and "that by the terms of this contract the complainant * * * can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business."

As we have said, the suit in the Federal court was not a suit for taxes, but to establish an irrevocable contract between the complainant and the State under the Hewitt act of 1886, and to test the validity of the attempt to impair that contract through the agency of the act of November 11, 1892, and that court adjudged the contract to exist and the act of November 11, 1892, to be void. And we most respectfully urge that if the last-named act under which this tax is sought to be imposed is void, it was void *ab initio* and during each and every year up to, as well as after, the decree in the Federal court of June, 1898.

It is true that this suit at bar is an action to recover a sum alleged to be due the city for taxes, and the existence of the contract under the Hewitt bill and the invalidity of the act of November 11,
323 1892, and the judgment between the parties in a court of competent jurisdiction, wherein it was held that the inviolable contract *had been established* and that the act of November 11, 1892, *was void*, are pleaded.

In view of the fact that the court does not take issue with the authorities cited in the brief, especially those from this court, we must conclude that they properly state the law; and as the court in the opinion concedes that the same effect must be given to the judgment of a Federal court as if it were the judgment of a State court, we do not see how the conclusion can be escaped that in this instance full effect must be given to the judgment of the Federal court until that judgment is, by that court in a proper proceeding, set aside.

This court, in Garner's Adm'r *v.* Strode, 5 Litt., 314, held:

"To avoid the effect of a decree in another cause where its merits are collaterally brought in question cannot be permitted. The first record must be changed, and then its collateral operation will not be injurious. However strong the equity of the appellant may be, the bar must operate while it exists unaltered and unreversed."

Paul *v.* Smith, 82 Ky., 451.
Duprey *v.* Johnson, 4 Bibb., 562.
Hollister *v.* Abbott, 64 Am. Dec., 342.
12 Am. & Eng. Ency. of Law, 1490.
Freeman on Judgments, section 485, page 852.

We ask the attention of the court to the authorities upon this proposition as cited in our printed brief.

324 We most respectfully take issue with the court in the statements in the opinion to the effect that either the U. S. circuit court or the U. S. Supreme Court held in the case referred to, that this appellee bank had no contract rights which gave it immunity from taxation by the city of Frankfort, or that it was protected against the enforcement of such taxes solely by reason of the unreversed judgment alluded to. The United States Supreme Court affirmed the judgment of the circuit court without delivering an opinion (174 U. S., 800,) and as we read the opinion delivered in the U. S. circuit court it does not hold in, or as to, the case of the appellee bank that it had no contract rights which gave it immunity from taxation by the city of Frankfort, or that it was solely protected by the said unreversed judgment. On the contrary, by the language quoted, *supra*, from the opinion in the case of the Bank of Kentucky referred to in the short opinion in the case of the appellee bank, Judge Taft said that the court was relieved from examining into the question of the existence of the contract of immunity, as an original question between these parties, because it had already been conclusively adjudicated that such a contract existed.

It would seem by no means to follow that because of the discovery of new evidence bearing on the question, to wit: the reversal of the conclusive adjudication referred to by the learned Judge Taft, the U. S. circuit court would, upon the presentation of such new evidence, set aside its former decree and adjudge that no such contract existed. It might now, in passing upon that issue
325 as an original question between these parties, independent of the former judgments relied upon, concur with this court in the opinion delivered through Judge Pryor, and adjudge that the contract did exist.

It is true that as between other parties and in another entirely independent cause and record, and in which no prior adjudication was pleaded, Judge Taft did hold that an irrevocable contract was not made by the Hewitt bill, and its acceptance by that bank, but that opinion and judgment, however, convincing as authority and precedent, is not binding upon this appellee bank. And however strong may be the convictions of this court upon that question, and in the belief that the Federal court would, upon proper occasion, concur and rule as it has heretofore done, yet that court's judgment, as between these parties, must, as it seems to us, stand and obtain until by it removed, and else a disregard be had of the rule established by the decisions, *supra*, which say that, "however strong the equity of the appellant may be, the bar must operate while it exists unaltered and unreversed."

However strong and convincing the newly discovered evidence may be this court cannot pass upon its effect and set aside or disregard the judgment of another tribunal.

Again, we respectfully ask the court to reconsider the question as to the effect of the reversal on the former appeal. In the opinion now rendered the court makes the sweeping statement: Under the opinion of this court (22 Ky. Law Rep., 466,) and the response to

the petition for rehearing (22 Ky. Law Rep., 1384,) all questions are illiminated from the case except the question as to whether
326 the right to recover the taxes for the years in question is barred by the judgment of the Federal court, &c.

In this conclusion we think the court is in error, and upon the point we invite a re-examination of the argument contained in our brief. In that argument we attempted to show, and we think we did show, that none of the questions arising upon the plea in abatement contained in the first paragraph of the appellee bank's answer were considered, either by the court below in rendering its judgment or by this court on the appeal, or were necessarily involved or could have been considered then by this court. The judgment of the circuit court, as the judgment on its face states and shows, was rendered solely upon the agreement of counsel: That it was based solely upon two propositions of fact: First, that counsel had agreed "that the liability of the bank for the taxes claimed in this case should be settled and determined by the decision of the court of appeals," in two-named cases then pending in this court, to which the bank was a party; and, second, that the mandate and opinion of this court in said two cases, which had been filed, showed that this court had sustained the defense of the bank of an irrevocable contract under the Hewitt bill. And in consequence of such facts that court decreed the bank had a contract of immunity from the taxes, and that the act of November 11, 1892, in so far as intended to assess or enforce such taxes was void.

It was that judgment which was before this court for review on the former appeal, to be by this court either affirmed or reversed. In considering that judgment this court said:

327 "The bank then filed its answer relying solely on its alleged contract with the State under the Hewitt law."

Thus showing that this court did not take into consideration the plea in abatement contained in the first paragraph of the answer. This court, in the then opinion, held: First, that the alleged agreement of counsel had not been set up by plea, and if it had been it was beyond the scope of authority of counsel to enter into such an agreement, and the same was, therefore, inoperative and void; second, that although the judgment of the court below on the defense of contract set up by the bank was in consonance with the rule of decision of this court at the time the judgment was rendered, yet, inasmuch as this court had subsequently changed its rule of decision on that question, the contract set up by the bank did not constitute a defense. Therefore, the pleadings did not authorize an affirmance of the judgment, and it was reversed "*for further proceedings consistent with this opinion.*"

But nowhere in that opinion is the first paragraph of the answer mentioned or discussed, or declared insufficient as a plea in abatement. Nor is it discussed or so held in the response to the petition for rehearing.

It is true that the response makes the quotation from section 386 of the Civil Code: "Judgment shall be given for the party whom

the pleadings entitle thereto, though there may have been a verdict against him."

And cites the case of Maddox *v.* Fox, 8 Bush, 402, as holding that a judgment not warranted by the pleadings must be reversed.

These propositions are unquestioned, and the court reversed
328 the judgment, but in so doing it did not direct a judgment for the appellant, as it would have done had it regarded the plea in abatement as insufficient, but directed further proceedings consistent with the opinion.

The court was bound to reverse that judgment, no matter what opinion it may have entertained in regard to the plea in abatement, because the plea in abatement, if sustained, only authorized a judgment dismissing the petition without prejudice, while the judgment as rendered adjudged an irrevocable contract. Hence the questions under the plea in abatement were not only "*not necessarily involved,*" *but were not proper to be considered* under the judgment then before the court for review, and, therefore, were not raised or discussed or decided either in the opinion or the response.

A rehearing and affirmance of the judgment below is respectfully asked.

FRANK CHINN,
D. W. LINDSEY,
Counsel for Appellee.

329 Afterwards at a court of appeals held as aforesaid on the 10th day of January, 1902, the following order was entered herein, to wit:

Order Overruling Petition.

The court being sufficiently advised, it is considered that the petition for rehearing in this case be overruled.

Afterwards at a court of appeals held as aforesaid on the 15th day of January, 1902, the following order was entered herein, to wit:

Judge O'Rear delivered a dissenting opinion herein in which Judges Du Relle and Burnam concur. The following is the dissenting opinion:

Dissenting Opinion.

Court of Appeals of Kentucky, Jan. 15th, 1902.

BOARD OF COUNCILMEN OF THE CITY OF Frankfort, Appellant, *vs.* DEPOSIT BANK OF FRANKFORT, Appellee.	Appeal from Franklin Circuit Court.

Dissenting opinion by Judge O'Rear.

To my mind the controlling question in this case is: Does the judgment of the United States circuit court of June 1898, in the action of The Deposit Bank of Frankfort *vs.* Samuel H. Stone *et al.*, decide

necessarily the matter involved in this suit? If it does, the parties to this suit having been parties to that, the judgment being
330 unreversed, and yet in force, it is a bar to this suit by appellant.

Here appellant seeks to recover of appellee bank certain taxes under the existing revenue law. Appellee in the former action in the United States court, claimed, and that court decided that it had, such a contract with the State of Kentucky by having accepted the provisions of what was known as the "Hewitt law," that it could not without its consent be taxed otherwise than as provided by that law—which did not admit of the taxation now sought to be enforced. In the suit in the Federal court taxes for the years 1895, 1896, 1897, and 1898 "and any subsequent years" seems to have been put directly in issue. The court's judgment, though, goes beyond the mere adjudication of the right to collect the municipal tax for those years "and subsequent years." The court expressly adjudged:

"It is further adjudged, ordered and decreed that by reason of the several pleas of *res adjudicata*, relied on by the complainant in its bill and as shown by the exhibits therewith, the complainant has established a contract with the Commonwealth of Kentucky under the provisions of article 2 of the act of the General Assembly of the State of Kentucky, entitled 'An act to amend the revenue laws of the Commonwealth of Kentucky' approved May 17th, 1896, and the acceptance of the same by the complainant, the terms of which contract the Commonwealth cannot alter or change without the consent of the complainant; that by the terms of this contract the com-
331 plainant and its shares of stock, cannot, during its corporate existence, be assessed for taxation for State purposes in a different mode or at a greater rate of taxation than as prescribed in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present constitution of the Commonwealth of Kentucky and the act of November 11th, 1892, so far as they are intended to provide or do provide for any assessment or taxation of the complainant's property rights of property, or franchise, or shares of stock, except to the extent and in the manner provided by section- 1, 2 and 3 of article 2 of said act approved May 17th, 1886 and except to assess and tax for county and municipal purposes upon its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void."

It is said in the majority opinion that as the decision of the Federal court was based upon a judgment then in force in the State court, but subsequently reversed, the United States court probably would not have decided the case as it did if the State court judgment had not then been in force. I apprehend that the question presented here by the plea of *res adjudicata* is, not what the court ought to have decided, nor as to whether its decision was supported by the facts or in law, but, *did it decide the question now* involved? From the language quoted from its judgment, I think it did. That
332 judgment distinctly and unequivocally declared the acceptance of the Hewitt law by appellee was an irrevocable contract.

It enjoined the city from attempting to collect *any* tax upon appellee's shares of stock, except in the manner and to the extent provided in the Hewitt bill. If we were at liberty to disregard the fact that was adjudicated, and in this collateral attack look merely to the *basis* or reason for the decision, we would at once have to determine, upon any plea of *res adjudicata*, the merits of the original controversy. This, of course, could not be allowed. To do so would be to abandon at once the whole doctrine of *res adjudicata*,—one of the most necessary branches of the law of estoppel.

The temptation is often strong, in a case of peculiar merit, to abandon, or at least to lay aside, the doctrine. Sometimes its very harshness repels the instinctive sense of justice. Yet, upon a careful reconsideration of the reasons underlying it, and especially of the interminable confusion and uncertainty that must result in the conflicts inevitable upon its abandonment, I believe a safer course lies in its uniform, strict observance.

This court has from a very early date, and with entire consistency until this decision, subscribed to the efficacy of the doctrine as generally applied by common-law courts.

In Garner's Adm'r, *vs.* Strode, 5 Litt, 314, where the judgment collaterally attacked was rendered by the court in which the plea against the attack was made, it was said:

333 "To avoid the effect of a decree in another cause, where its merits are collaterally brought into question, cannot be permitted. The first record must be first changed, and then its collateral operation will not be injurious. However strong the equity of the appellant may be, the bar must operate while it exists, unaltered and unreversed."

In the earlier case of Dupuy *vs.* Johnson, 1 Bibb, 565, (1809) by Judge Boyle, this court held:

"That a judgment or decree pronounced by a court having competent jurisdiction of the case is binding until it is reversed by a court of appellate jurisdiction, and that it can never be overhauled, or its correctness questioned in an original suit, is a doctrine founded upon principles too solid to be shaken, and too obvious to require discussion. The contrary doctrine would involve the monstrous absurdity of making litigation endless, and rendering every decision fruitless and unavailing."

As late as Paul *vs.* Smith, 82 Ky., 451, this view has been sustained. So far as I know it has never before been questioned by the court.

For these reasons alone the judgment below should have been affirmed.

Judges Du Relle and Burnam concur in this dissent.

334 On the 17th day of March, 1902, the appellee filed a petition for a writ of error to the Supreme Court as follows:

Court of Appeals of Kentucky.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Appellant,
vs.
DEPOSIT BANK OF FRANKFORT, Appellee.

Petition for Writ of Error.

Considering itself aggrieved by the final decision of the court of appeals in rendering judgment against it in the above-entitled case, the appellee Deposit Bank of Frankfort hereby prays a writ of error from said decision and judgment to the Supreme Court of the United States. And files herewith its assignment of errors.

D. W. LINDSEY,
FRANK CHINN,
For Appellee, Deposit Bank of Frankfort.

STATE OF KENTUCKY, *Court of Appeals,* } ss:

Let the writ of error issue upon the execution of a bond by the Deposit Bank of Frankfort in the sum of — thousand dollars; said bond when approved to act as a supersedeas.

Dated March 17, 1902.

B. L. D. GUFF,
Chief Justice of the Court of Appeals of the State of Kentucky.

335 *Writ of Error.*

United States Supreme Court.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit,* } ss:

The President of the United States to the court of appeals of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals of Kentucky between the Board of Councilmen of the City of Frankfort against the Deposit Bank of Frankfort a manifest error hath happened, to the great damage of the said The Deposit Bank of Frankfort as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on or before thirty * days from the date hereof next, in the said United States Supreme Court, to be then and there held, that the

record and proceedings aforesaid being inspected, the said United States Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 17th day of March, in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States of America the one hundred and twenty-sixth year.

Seal 6th Circuit Court, Eastern Ky. Dis., U. S. of America.

W. G. CHAPMAN,
Clerk of the Circuit Court of the United States at Frankfort, Kentucky.

Allowed by
B. L. D. GUFFY,
Chief Justice Court of Appeals of Kentucky.

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* Not exceeding 30 days from the day of signing the citation.

[Endorsed:] Original. Filed Mar. 17 1902 S. J. Shackelford, C. C. A.

336 The following is a copy of the bond executed by the appellee upon the granting of the writ of error herein:

Bond.

Supreme Court of the United States.

DEPOSIT BANK OF FRANKFORT, Plaintiff in Error,
vs.
BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Defendant in Error.

Bond.

Know all men by these presents, that we, the Deposit Bank of Frankfort as principal and J. B. Hendricks and David Nicol as sureties are held and firmly bound unto the Board of Councilmen of the City of Frankfort in the sum of three thousand dollars, to be paid to the said city, to which payment well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals and dated this 17th day of March 1902.

Whereas the above-named plaintiff in error seeks to prosecute its writ of error to the Supreme Court of the United States to reverse the judgment rendered in the action in the court of appeals of Kentucky in which said Board of Councilmen was appellant and said bank was appellee.

Now, therefore the condition of this obligation is such that if the above-named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged if

it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

DEPOSIT BANK OF FRANKFORT,
By J. BUFORD HENDRICK, *Its Pres.*
J. BUFORD HENDRICK.
DAVID NICOL.

Approved.
B. L. D. GUFFY,
Chief Justice Court of Appeals of Kentucky.

337 *Affidavit.*

STATE OF KENTUCKY, }
Franklin County, } *ss:*

J. B. Hendrick and David Nicol being each duly sworn on oath depose and say: We are each of lawful age and are citizens of the State of Kentucky, and know the contents of the foregoing instrument to which we have attached our names. We each for himself say we are worth the sum of ($4,000.00) four thousand dollars over and above all debts liabilities and exemptions.

J. BUFORD HENDRICK.
DAVID NICOL.

Subscribed and sworn to before me this 17th day of March 1902. My commission expires Jan'y 14th, 1904.

[SEAL.] U. KEENON,
Notary Public, Franklin Co., Ky.

The above bond is approved.
B. L. D. GUFFY,
Chief Justice of the State of Kentucky.

338 Afterward on the 18th day of March 1902 the appellee and plaintiff in error filed its assignment of errors herein as follows:

Assignment of Errors.

Court of Appeals of Kentucky.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT, Appellant, }
vs.
DEPOSIT BANK OF FRANKFORT, Appellee. }

Assignment of errors.

Now comes the above appellee and files herewith its petition for a writ of error, and says that there are errors in the records and proceedings in the above-entitled case, and for the purpose of having the same reviewed by the Supreme Court of the United States, makes the following assignment:

The court of appeals erred in holding and deciding that the facts

alleged in the supplemental answer of the appellee did not constitute an estoppel and bar, to the claim of the appellant asserted in this case, which error is more particularly set forth as follows:

The court of appeals of Kentucky erred in holding and deciding in said judgment of November 19th 1901 (which judgment became final on January 10th, 1902, when the petition of the appellee bank for rehearing was overruled) that article 2 of the act of the General Assembly of the Commonwealth of Kentucky entitled

An act to amend the revenue laws of the Commonwealth of
339 *of* Kentucky, approved May 17th, 1886 (General Statutes of Kentucky chap. 92 art. 2) and the acceptance of the provisions thereof by the appellee bank did not constitute an irrevocable contract between said bank and the Commonwealth of Kentucky, which the latter could not alter or change without the consent of the former; and also in holding and deciding that said art. 2 of said act of 1886, was repealed by the provisions of the present constitution of Kentucky, and by the act of the General Assembly of the Commonwealth of Kentucky approved Nov. 11th 1892 (art. 3 chap. 103 Acts of Kentucky 1891-'2-'3). The validity of said article 2 of the act of 1886 was asserted and relied on by the appellee bank, and the validity of said provisions of the constitution of Kentucky and of the said act of 1892 was denied and drawn in question by the appellee bank on the ground that the same were in violation of and repugnant to the Constitution of the United States, and in contravention thereof; and said judgment of June 25th, 1898 was relied on by appellee bank as *res adjudicata* of those questions.

The said errors are more particularly set forth as follows: The court of appeals of Kentucky erred in holding and deciding:

First. That said article 2 of the act of 1886 did not constitute an irrevocable contract between the appellee bank and the Commonwealth.

Second. That said provisions of the constitution and said art. 3 of the act of 1892 as applied to the appellee bank did not impair
340 the obligation of contracts contrary to the provisions of the Federal Constitution art. 1 sect. 10, and was not in violation of, or repugnant to said Federal Constitution. And in refusing to hold and decide that the judgment of the circuit court of the United States of June 25th, 1898, which was affirmed by the supreme court May — 1899, was *res adjudicata* of the validity of the appellee bank's said contract, and also of the validity of the said provisions of the constitution of Kentucky and of said article 3 of said act of 1892, in so far as the same were intended to apply to the appellee bank.

For which errors the appellee Deposit Bank prays that the said judgment and decision of the court of appeals of Kentucky be reversed and a judgment entered for appellee bank, and for costs.

D. W. LINDSEY,
FRANK CHINN,
Attorneys for Deposit Bank of Frankfort.

341 THE COMMONWEALTH OF KENTUCKY, *Court of Appeals,* } *sct:*

I, Samuel J. Shackelford, clerk of the Kentucky court of appeals, hereby certify that the foregoing three hundred and forty pages contain a true, full and complete transcript of the record and proceedings had in said court of appeals in the case wherein The Board of Councilmen of the City of Frankfort was appellant and The Deposit Bank of Frankfort, appellee, as the same appears of record and on file in my office. I further certify that there is returned herewith the original petition for & writ of error, a copy of which remains on file in my office, also copies of the bond and assignment of errors, the originals of which are on file in my office.

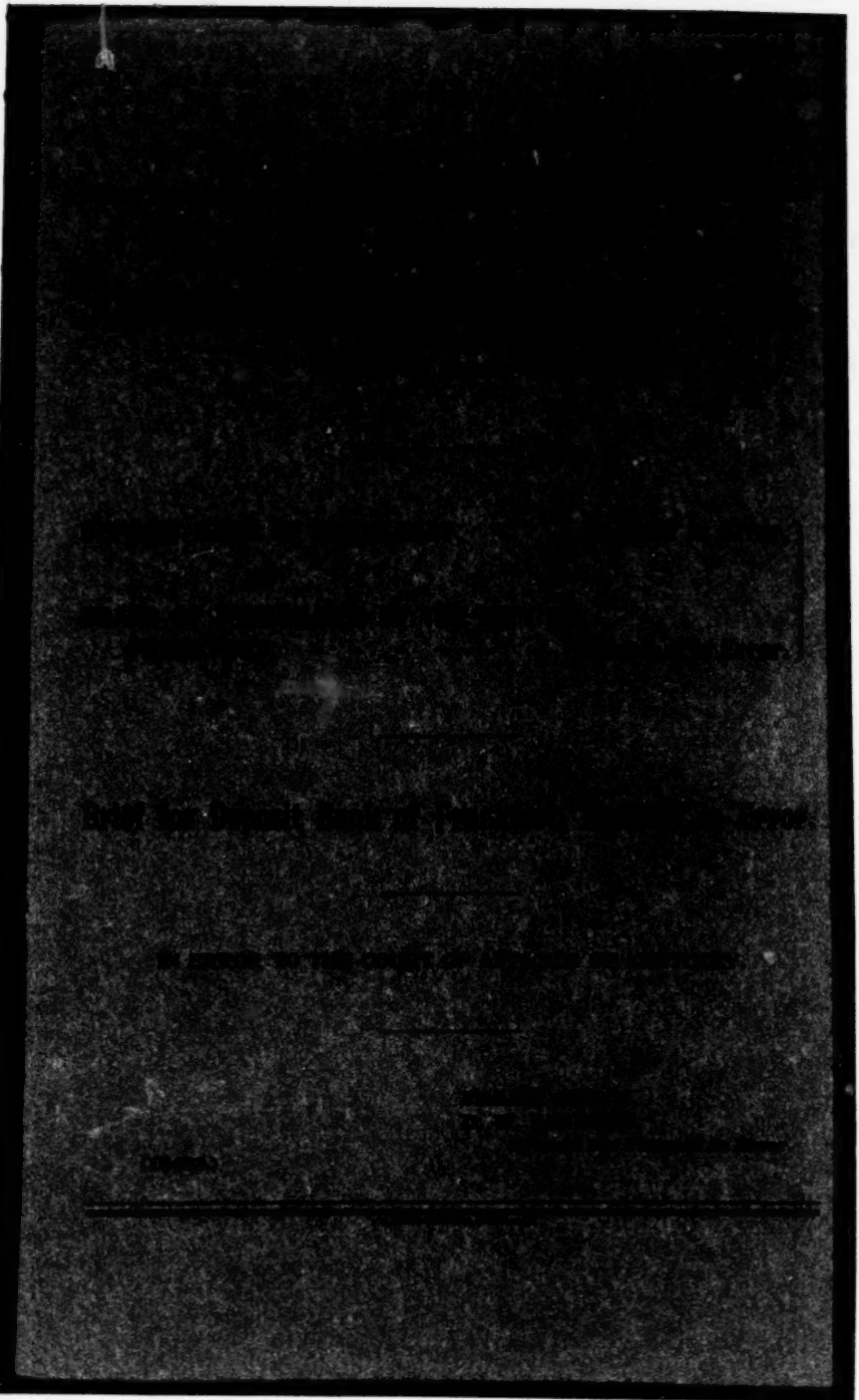
In testimony whereof, I have hereunto set my hand and affixed the seal of my office. Done at Frankfort, Ky., this 4th day of April, A. D. 1902.

[Seal Kentucky Court of Appeals.]

SAMUEL J. SHACKELFORD,
Clerk of the Kentucky Court of Appeals.

Fee for this transcript $91.75.

Endorsed on cover: File No. 18,483. Kentucky court of appeals. Term No. 296. The Deposit Bank of Frankfort, plaintiff in error, *vs.* The Board of Councilmen of the City of Frankfort. Filed April 11th, 1902.



POINTS ARGUED AND AUTHORITIES.

1st. The decree of the U. S. Court relied on as a bar to this action having been rendered by a court having jurisdiction of the cause and of the parties, is conclusive upon the city in every other Court so long as that decree stands unreversed.

Hollister vs. Abbott, 64 Am. Dec., 342, and cases cited.
Dupuy vs. Johnson, 4 Bibb, 562.
Garner's Adm'r vs. Strode, 5 Litt. 314.
Paul vs. Smith, etc., 82 Ky. 431.
Davis vs. McCorkle, 14 Bush, 751.

2d. And the fact that this action was begun before that in which the United States Court suit was filed does not alter the rule.

Amer. and Eng. Encycl. of Law. volume 12, page 149c, and cases there cited.

3d. The Court of Appeals was without jurisdiction to decide whether or not the United States Court based its judgment upon one or all of the pleas of *res judicata* set up and relied on by the bank in that case, the rule being well settled that "as between National and State Courts, neither will undertake to grant relief from a judgment rendered by the other. One having equitable grounds for relief from a judgment rendered in Courts of either must apply to the Court of the sovereignty in which the judgment was rendered.

Freeman on Judgments, section 485, page 852.
Citing Riggs vs. Johnson & Co., 6 Wall. 166.
U. S. vs. Keokuk, 6 Wall. 514.
Engles vs. Miller, 2 Rich. Eq. 320.
Strozen vs. Hawes, 30 Ga. 578.
1 U. S. Stats. at Large, 335.

The Federal question is, that the rights and immunities which the Deposit Bank acquired under the decree of June, 1898, affirmed by this Court, have been denied and disregarded by the State Court by the judgment in error, in violation of section 709, Revised Statutes of the United States.

Foster's Fed. P. & P., volume 2, page 1180, note 1.
Citing Tex. & Pac. R. Co. vs. Johnson, 151 U. S. 81-99.
Citing U. S. Rev. Stat., section 709; 172 U. S. 493.
Dowell vs. Appellate, 152 U. S. 327.

Supreme Court of the United States.

DEPOSIT BANK OF FRANKFORT, – – *Plaintiff in Error,*

vs.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT,
Defendant in Error.

BRIEF FOR DEPOSIT BANK OF FRANKFORT, PLAINTIFF IN ERROR.

This writ of error is brought to reverse the judgment of the Kentucky Court of Appeals, upon the ground of that court's refusal to give effect to the judgment of this court when pleaded as an estoppel in a suit in that court between the same parties and upon the same subject-matter, upon the ground of newly-discovered evidence presented to the State court since the judgment of this court was rendered. A decree was rendered by the Circuit Court of the United States, the opinion being delivered by Judge Taft, June 25th, 1898, in an injunction suit by the Deposit Bank of Frankfort, plaintiff in error, against the City of Frankfort, defendant in error, in which the contract of the bank under what is known as the Hewitt law was upheld upon the ground of *res judicata*, and the act of 1892, imposing taxes on the bank, was held to be in contravention of the Constitution of the United States. That decree was appealed to this court, where it was affirmed in 1900. That decree was pleaded by the bank in bar of an action in the State Court by the City

against the bank for taxes under the act of 1892, and the Court of Appeals held that the city was not estopped by it. This is a brief statement of the case made on this writ of error, but there have been so many different suits between these parties and so many different judgments are presented in the record, that we beg the indulgence of the court to a statement of these suits, and of the different proceedings in the different courts, in order that the court may see clearly the circumstances under which the judgment in error was rendered.

This statement is made all the more necessary by the fact that several different suits were heard with this bank's suit, and the judgment in those cases appear in this record though they have no bearing on the question now before the court.

In August, 1894, the city filed this petition in equity in the Franklin Circuit Court against the Deposit Bank of Frankfort, plaintiff in error, to recover taxes for the years 1892-3-4 with, penalties. It was alleged in the petition that the assessments for those taxes had been placed in the hands of the tax collector for collection, and by him returned no property found.

To this petition the bank filed a demurrer, which was sustained as to the tax for 1892 and the penalties, and overruled as to the taxes for 1893 and 1894. (R. 6.)

The bank then, on September 27th, 1894, filed its answer in two paragraphs, in the first of which it denied any indebtedness whatever to the city for taxes, denied the alleged assessment and the return of no property found, and in the second paragraph it set out and relied upon its contract with the Commonwealth under the Hewitt law as exemption from all taxation by the city, and alleged that the act of 1892, under which the taxes were claimed, was in contravention of

section 10, article 1 of the Constitution of the United States, and asked that the city be enjoined from attempting to assess or collect any taxes against the property or franchise of the bank. (R. 4 to 11.) At the previous term of the Franklin Circuit Court judgments had been rendered in favor of the city and county, in two suits, which had been brought against them by the Bank of Kentucky and Farmers Bank, to enjoin the collection of taxes asserted against those banks, upon the exact ground stated in second paragraph of the answer of the Deposit Bank, above described, which was in substance that those banks had a contract with the State under the Hewitt law by which the banks were exempted from payment of city or county taxes. At the same term two suits between the Deposit Bank and the county in regard to the bank's liability for county taxes, by reason of its contract under the Hewitt law, had been decided in favor of the county and against the bank. All these decisions were based upon the repeal of that law by the act of 1892, and the banks had taken appeals to the Court of Appeals, which were then pending. And as the validity of the Hewitt law was the real question involved in the cases appealed, in suits of the same nature as this suit, and the same attorneys represented both the county and city in each of the suits against the banks, the counsel for the city and the bank thought it unnecessary to prosecute this suit further, and they made an agreement, which was afterwards recited in the judgment rendered in conformity to it, which agreement was—

> "That this action should stand upon the answer filed by the defendant until the decision by the Court of Appeals in the two cases appealed from this Court, in one of which the defendant bank was plaintiff and the County of Franklin, etc., were defendants, and in

the other the Commonwealth, for the use of the County, was plaintiff, and the defendant bank was defendant, and the liability of the bank for the taxes claimed in this case should be settled and determined by the decision of the Court of Appeals in said two cases, the defense relied on in this case being the same contract set up and relied upon by the bank in those two cases."
(See judgment, R. 2.)

This agreement was perfectly fair to both sides, as any action taken by the Court of Appeals in the other cases mentioned would also be taken in this case, and as there were already pending in that court about one dozen cases from other courts upon exactly the same question (the validity of the Hewitt law), it was manifestly for the interest of both parties that they should get the full benefit of that appeal as provided in the agreement, without the additional labor and costs of it. And the agreement was kept in good faith, neither side taking any step in the case until February 1, 1896, when the following judgment was rendered in it (R. 2):

"JUDGMENT.

"FRANKLIN CIRCUIT COURT.

"Filed February 1st, 1896.

"BOARD OF COUNCILMEN, CITY OF FRANKFORT . . . . . *Plaintiff.*	
"VS.	Judgment.
"DEPOSIT BANK OF FRANKFORT . . . . . *Defendant.*	

"It appearing to the court that this action has been continued and not herefofore submitted, by agreement between the plaintiff and defendant, by their respective

attorneys, that this action should stand upon the answer filed by the defendant until the decision by the Court of Appeals in the two cases appealed from this court, in one of which the defendant bank was plaintiff and the county of Franklin, etc., were defendants, and in the other the Commonwealth, for the use of said county, was plaintiff, and the defendant bank was defendant, and the liability of the bank for the taxes claimed in this case should be settled and determined by the decision of the Court of Appeals in said two cases, the defense relied on in this case being the same contract set up and relied upon by the bank in those two cases, and it further appearing to the court by the mandates and opinions of the Court of Appeals filed in said two cases, that the Court of Appeals has sustained the defense set up and relied on by the bank in said two cases, based upon the contract made by the bank under the Hewitt bill, which is the same contract relied on as a defense in this case, it is now ordered and adjudged that Art. 2 of the Act of the General Assembly, entitled 'An act to amend the revenue laws of the Commonwealth of Kentucky, approved May 17, 1886 (Gen. Statutes, chap. 92, art. 2), and the acceptance of the provisions thereof by defendant, constituted a contract between the defendant and the Commonwealth which the latter can not alter or change without the consent of the former; by the terms of which contract the defendant can not, during the continuance of its charter, be assessed for taxation, or taxed for State purposes in a different mode or at a greater rate of taxation than as provided for in said act, and can be assesesd for taxation and taxed for county and municipal purposes only upon any real estate it may own; that the provisions of the present Constitution of this State and

of the act of Nov. 11, 1892 (art. 3, chap. 103, Acts 1891-2-'3), in so far as they are intended to provide for any assessment or taxation of the defendant's property, right of property or franchise except its said real estate, are in violation of and repugnant to the Federal Constitution and void; that the board of valuation and assessment provided for in said act of Nov. 11, 1892, had and has no authority in law to assess or value the defendant's franchise for taxation, or the auditor to apportion or certify the same, or any part of the same, for county or municipal taxation; that the temporary injunction which was prayed for in this cause at the commencement of the action be, and the same is now hereby, granted, and the defendants and each of them are perpetually enjoined and restrained from levying upon or selling any property of the defendant for the purpose of collecting any taxes for the city of Frankfort upon the franchise or property of the defendant, except upon its real estate, and it is further adjudged that the defendant recover of the plaintiff its cost in this action expended. To all of which the board of councilmen of the city of Frankfort except and pray an appeal to the Court of Appeals, which is granted."

And notwithstanding the highest court in the State had, after the fullest argument, declared, in the opinion delivered by Judge Pryor, in June, 1895, that the act of 1892 did not repeal this bank's contract, the city on November 14, 1895, filed a suit in the Franklin Circuit Court against the State Board of Valuation and Asessment and this bank, the Bank of Kentucky and Farmers Bank, to compel that board to assess the franchises of those banks for city taxation for the year 1895. The three banks filed answers to that suit at

the January term, 1896, in which they set out their contract, and also the judgments upholding it, and pleaded the same as *res judicata*. No other steps were taken in that suit except that the city, by amended petitions filed during each of the years 1896, 1897, 1898 and 1899, asked that the board be compelled by mandamus to certify the franchises of the banks for those years, the amended petitions for 1898 and 1899 being both filed after the judgment of Judge Taft, hereinafter set out, had been rendered.

On May 12, 1897, this bank, together with the Bank of Kentucky and the Farmers Bank, filed its bill in the Circuit Court of the United States against the State Board of Valuation and Assessment, the County of Franklin and the City of Frankfort, in which it alleged the facts hereinbefore set out, concerning the attempts made by the city and county to collect taxes from it; and further alleged that, continuously since its organization in 1867 it had regularly paid taxes to the State upon all its property, and that the same had been accepted as in full of all other taxes against it, by express provisions of its charter, and also of the general laws then in force, and it further alleged that by the settled course of the decisions of the Court of Appeals in Kentucky the provisions of the bank's charter exempting it from all other taxation, by the payment of more taxes to the State than was exacted from other kinds of property, had been upheld. (R. 39.)

And several different suits were set up and relied on as *res judicata* of that question, and copies of the records in all of those cases were filed as exhibits with the bill. The prayer of that bill is as follows:

> "The premises considered, the complainant prays that the said Samuel H. Stone, Charles Finley and

George W. Long be perpetually enjoined and restrained from assessing the value of the complainant's capital stock under the said act of November 11, 1892, for the years 1894, 1895, 1896 and 1897, or any other year, and that the said defendant, Samuel H. Stone, be enjoined from certifying any such valuation to the said county and board of councilmen, and that the said county and Board of Councilmen of the City of Frankfort be enjoined and restrained from endeavoring to collect any tax upon any such valuation; that the complainant's contract be fully established; that it be declared that upon conforming to its said contract as hereinbefore set up, by making the payments under the Hewitt law, no other or further tax shall be exacted from it under any form or by any authority."

The City, County and State board made various defenses in this bill; denied that the bank was protected by the judgments relied on as *res judicata*, and alleged that the Hewitt contract had been repealed by the act of 1892. The case of this bank and of the other two Frankfort banks, in all of which the question as to validity of the Hewitt contract, and of the pleas of *res judicata*, were in issue, were heard by Circuit Justice Harlan and Circuit Judges Taft and Lurton, at Nashville, in connection with a number of tax cases from Louisville, on May 28, 1897, upon the answer of the county and city and the pleas filed. The city being advised by that trial that the judgment of February 1, 1896, was being relied on by the bank as *res judicata*, in order to destroy its effect, sued out an appeal from that judgment in the Court of Appeals, on January 14, 1898, having abandoned the appeal granted in the Circuit Court. On June 25, 1898, the decree in the suit in the United States Circuit Court was

rendered in which the contention of this bank was fully upheld, its contract under the Hewitt law established in the very terms of the prayer of the bill, which decree is as follows:

"DECREE.

"DEPOSIT BANK OF FRANKFORT,

"vs.

"SAMUEL H. STONE, *et al.*

"The court being sufficiently advised, files its opinion herein.

"It is therefore adjudged, ordered and decreed as follows:

"First. That the demurrer of the defendants, Board of Councilmen of the City of Frankfort and Franklin county, and of the defendants, Samuel H. Stone, G. W. Long, and Charles Finley, be, and the said demurrers are, hereby overruled; to which the said defendants each except.

"Second. The plea of defendants, Board of Councilmen of the City of Frankfort and Franklin county, to the bill of complaint is overruled; to which the said defendants except.

"Third. Thereupon came the complainant, by Frank Chinn, its counsel, and files its replication to the answer of the defendants, Board of Councilmen of the City of Frankfort and Franklin county.

"The defendants, county of Franklin and City of Frankfort, offered to file an amended answer, to which

complainant objected, and the motion to file is overruled; to which said defendants except, and said amended answer is made a part of the record by the order.

"And by consent this cause came on to be heard for final decree. The complainant read upon hearing its bill of complaint and its amended bill of complaint herein, together with all the exhibits filed with said bills, to-wit:

"Exhibit 'A,' being the record of the proceedings in the case of Deposit Bank of Franklin against Franklin county and John W. Gaines, sheriff.

"Exhibit 'B,' being the records in the proceedings in the case of Deposit Bank of Frankfort against Franklin county and R. D. Armstrong, sheriff.

"Exhibit 'C,' being judgment of Franklin Circuit Court, entered February 1, 1896, in the suit of Deposit Bank of Frankfort against Franklin County.

"Exhibit 'D,' being record of the proceedings in the case of Board of Councilmen of the city of Frankfort against Deposit Bank of Frankfort.

"The defendant, the county of Franklin, read on the hearing its answer, and the defendant, Board of Councilmen of the City of Frankfort, read on the hearing the record of the proceedings in the case of Board of Councilmen of City of Frankfort against L. C. Norman, auditor, etc., and also read its answer.

"And it is now adjudged, ordered, and decreed that the defendants, Samuel H. Stone, Charles Finley and George W. Long, be, and they are hereby, perpetually enjoined and restrained from proceeding to value the franchise of the complainant under the act of November 11, 1892, for the years 1895, 1896, 1897, 1898, or for any other subsequent years until the expiration of the charter of the complainant, and are enjoined and restrained from

certifying such value to the county clerk of Franklin county or to any officer of the Board of Councilmen of the City of Frankfort or the County of Franklin; and the defendants, county of Franklin and Board of Councilmen of the City of Frankfort, are enjoined and restrained from endeavoring to collect any tax upon any such valuations; *and the complainant, by making payments in accordance with the Hewitt law, is discharged in full from all taxes to be exacted from it under any form or by any authority.*

"*It is further adjudged, ordered and decreed that by reason of the several pleas of res judicata, relied on by the complainant in its bill and as shown by the exhibits therein, the complainant has established a contract with the Commonwealth of Kentucky under the provisions of article 2 of the act of the General Assembly of the State of Kentucky, entitled 'An act to amend the revenue laws of the Commonwealth of Kentucky,' approved May 17, 1896, and the acceptance of the same by the complainant, the terms of which contract the Commonwealth can not alter or change without the consent of the camplainant; that by the terms of this contract the complainant and its shares of stock can not, during its corporate existence, be assessed for taxation for State purposes in a different mode or at a greater rate of taxation than as prescribed in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present Constitution of the Commonwealth of Kentucky and the act of November 11, 1892, in so far as they are intended to provide, or do provide, for any assessment or taxation of the complainant's property, rights of property, or franchise, or shares of stock, except to the extent and in the manner provided by sections*

1, 2 and 3 of article 2 of the said act approved May 17, 1886, and except to assess and tax for county and municipal purposes upon its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void.

"And it is further adjudged that the complainant recover of the defendant its costs in this action expended.

"And came defendants and prayed an appeal in open court and tendered their assignment of errors; whereupon the court allowed the appeal, and orders the assignment of errors to be filed and fixes the appeal bond at one thousand dollars.

"June 25, 1898.

(Signed) "WM. H. TAFT,
"*Circuit Judge.*"

(The italics are ours.)

An appeal was prosecuted to this court from that decree, and it was affirmed (174 U. S. 412). The city filed a petition for rehearing, which was overruled.

It will be seen from these proceedings that the city had the fullest possible hearing in the courts upon every question at issue between it and the bank, including the validity of the agreement recited in the judgment of February 1, 1896, which was put in issue at every step of the suit, all of which have been decided adversely to it, and the discharge of the bank from all taxation by the city except alone tax on any real estate owned by it, fully and clearly established by the decree.

The counsel for the city having thus exhausted all means of compelling payment of taxes by these banks through the instrumentality of the courts,next resorted to the legislature and caused the charters of these three banks to be repealed

by the act of March 22, 1900, which is copied in the appendix to this brief.

In the meantime the appeal from the judgment of February 1, 1896, which had been allowed to drag along on the docket of the Court of Appeals, came on to be heard, and was reversed by the opinion of Judge Hazelrigg (R. 14) upon the ground that the agreement therein stated should have been set up by a pleading. The bank then filed a petition for rehearing (R. 16), in response to which, by Judge Hobson (R. 18), it was held that the attorneys for the city had no authority to make such an agreement. (R. 20.)

Notwithstanding the proceedings in this court had so effectually destroyed the foundation of the city's claim to tax this bank, and notwithstanding the repeal of its charter by the legislature, the city served notice December 20, 1900, on the former president of the bank that it had filed in the clerk's office of the Franklin Circuit Court the mandate of the Court of Appeals, reversing the judgment of February 1, 1896. The president filed his affidavit January 17, 1901, in which he set out the repeal, and stated that he was not president when the notice was served on him, and at the same time entered his special appearance, to suggest the repeal of the charter. (R. 23.)

No action was taken upon the question of the repeal, and the bank filed a supplemental answer (R. 24) in which it set out the facts in regard to the pendency in that court of the mandamus case above referred to, and the filing of its bill in the Circuit Court of the United States against the city and county, and all the proceedings therein, including the decree of Judge Taft and the affirmance of it by this court, and pleaded and relied upon said decree in bar of any recovery by the city in that action. To this supplemental answer the bank filed a reply (R. 27) in which it averred that the Federal

court judgment was based solely upon the judgment of February 1, 1896, which had been reversed by the Court of Appeals, and was therefore inoperative, and in addition, that the Federal court judgment was only for the taxes of the years 1895 and subsequent years, and therefore presented no obstacle to its recovery of taxes for the prior years 1893 and 1894. Both these averments were denied by the rejoinder of the bank. (R. 27.) The bank relied upon both defenses set up in the answer and supplemental answer; insisted that the State court had no authority to examine into the grounds upon which the Federal court had based its judgment, and that that judgment was conclusive, and could not be questioned in a collateral proceeding.

With the record in this condition the case was submitted to Special Judge Edelen, who rendered a judgment, February 2, 1901, dismissing the city's petition, upon the ground that it had failed to prove that the tax books had been returned "no property found," which fact had been alleged by the city and denied by the bank and that the city could not maintain the action without such return, by the express terms of the statute. (See judgment R. 33.)

From that judgment the city took an appeal to the Court of Appeals, which reversed it, by the judgment now before this court on writ of error. (R. 170.)

The errors relied on to reverse that judgment are set out at length in the assignment of error (R. 184), but may be briefly stated as follows:

(1) That the Court of Appeals erred in deciding that article 2 of the act of May, 1886 (the Hewitt law), did not constitute an irrevocable contract between the bank and the State of Kentucky;

(2) That the provisions of the Constitution of Kentucky and of article 3 of the act of 1892, as applied to this bank, did

not impair the obligation of that contract contrary to the provisions of the Constitution of the United States;

(3) And in refusing to hold and decide that the judgment of the United States Circuit Court, affirmed by this court, was *res judicata* of the question of this bank's liability for the taxes for 1893 and 1894 sued for.

Thus it appears that the Court of Appeals, by the majority opinion delivered by Judge Paynter, after reciting that "all questions are eliminated from the case, except the question as to whether the right to recover the taxes for the years in question is barred by a judgment of the Federal court," decides that question in the negative, upon two distinct grounds, namely (1) that the judgment of this court was based on a judgment of the Franklin Circuit Court, as *res judicata*, which judgment had since been reversed by the Court of Appeals, and "the foundation upon which the Federal court's judgment was based has been swept away by the opinion of the Court of Appeals," and (2) that the judgment of this court if otherwise valid, would not be a bar to recovery by the city for taxes for any other years than those in controversy in that suit.

Upon the last-named ground we do not think it necessary to do more than call the court's attention to the fact that it was one of the grounds relied on by the city in the former suit in this court to defeat the operation of the plea of *res judicata*, and in the opinion of Judge Taft, was decided against the city, upon the authority of New Orleans vs. Citizens Bank, 167 U. S. 371 (R. 115), and is therefore *res judicata* as to this case, and is stated in that opinion to be "the elemental rule, stated in text-books and enforced by many decisions of this court." That the majority of the Court of Appeals announced this as one of the grounds of reversal is only one of the many instances in which that majority have,

by their opinion in this case, disregarded that "elemental rule" and all those "decisions of this court."

That reversal was made upon the ground, as stated in the majority opinion delivered by Judge Paynter, that although this court held that this bank had "no contract rights with the State which relieved it from the payment of taxes to the city, yet because of the judgment of February 1, 1896, the city was barred from recovering the taxes for the years 1895-6-7-8." The opinion then proceeds.

> "So we have this anomalous condition, the Supreme Court of the United States holding in the case mentioned that the appellee had no contract rights which gave it immunity from taxation of the City of Frankfort, but that it was protected against the enforcement of the taxes for the years stated by reason of the unreversed judgment to which we have alluded. The same effect must be given to the judgment of a Federal court as an estoppel as if it were the judgment of a State court. That judgment having been reversed, the foundation upon which the Federal court's judgment was based has been swept away by the opinion of this court. Had it been reversed previous to the judgment of the Federal court, then of course that court would not have held the city was estopped by the judgment from asserting its claim for the taxes for the years there in controversy."

Until that statement was made in the opinion we had not thought it was possible for any court to sweep away the foundation upon which this court had rendered a judgment, or that any other court would be heard to say what this court would have decided upon a different record from that presented to it.

It is worthy of note that the statement is three times repeated in the opinion that this court, held in the former suit, that although this bank had no contract under the Hewitt law, yet exempted it from payment of city taxes solely on account of the judgment of February 1, 1856.

Our answer to all this is, that if these statements of the facts were correct the conclusion reached is erroneous, because that court is without authority to reverse the judgment of this court and to say what it would have decided upon a different state of facts. But we challenge the correctness of the facts stated in that opinion. This court did not hold that this bank did not have a valid contract under the Hewitt law, and the best evidence on that point is the decree itself, which we have quoted above.

That decree itself states that it was rendered not upon an "unreversed judgment of the Franklin Circuit Court," as the majority opinion recites, but "by reason *of the several pleas of res adjudicata, relied on by the complainant in its bill and as shown by the exhibits filed therewith, the complainant has established a contract*," etc.

But it is insisted that because only one judgment was mentioned by the court in the brief opinion rendered in the case of this bank (R. 156), there was no other ground for it, although the opinion referred in express terms to the opinion in the Bank of Kentucky case, where all the questions raised were disposed of with that care and ability for which Judge Taft is so distinguished.

It is well settled though, that—

> "The effect of a judgment as *res judicata* is not limited nor enlarged by the reasons given by the court for its rendition, nor by the failure of the court to give its reasons in writing on every point when required to do so by the Constitution of the State."
>
> Freeman on Judgments, volume 1, page 443.

That is the rule where the judgment or decree is silent as to the ground upon which it is given, with how much greater force, then, would it apply to a case like this, where the reasons are stated in detail in the decree.

But suppose it were admitted that Judge Taft was mistaken in saying, as he did in the decree, that the city was estopped by "several pleas of *res adjudicata*," because, to the mind of the majority of the Court of Appeals, there was only one such plea that had any merit in it, is it competent for that court to correct that mistake? In the view of the counsel for the city in that case this was only one of the many errors committed by the Circuit Court in that decree, and they adopted the only means known to the law for correcting them, which was appeal to this court, and on their failure to secure reversal they again urged the same, and other grounds, by petition for rehearing, all without avail.

But counsel for the city assert that they now have a better case, in that they have newly-discovered evidence upon the vital point, namely, the reversal of the judgment of February, 1896, and upon that evidence, presented in another case and in a different court, the Court of Appeals has practically annulled the judgment of the highest court in the nation.

It would be but reasonable to expect that the Court of Appeals in rendering an opinion of such far-reaching import ance, would have referred to some adjudged case in support of its position, especially when the contrary view was claimed to be upheld by a great number of cases which were cited and relied on by the bank, but not a single case is mentioned as bearing upon the point in controversy, while the authorities cited by the bank are entirely ignored.

The minority opinion delivered by Judge O'Rear, Judges DuRelle and Burnam uniting, states the controlling question in this case very clearly, as follows:

"Does the judgment of the United States Circuit Court of June, 1898, in the action of the Deposit Bank of Frankfort vs. Sam'l H. Stone *et al*, decide necessarily the matter involved in this suit? If it does, the parties to this suit having been parties to that, the judgment being unreversed, and yet in force, it is a bar to this suit by appellant." (R. 179.)

It is presented again in that opinion thus:

"I apprehend that the question presented here by the plea of *res adjudicata* is not *what* the court ought to have decided, nor as to whether its decision was supported by the facts or in law, but *did it decide the question now involved?*"

We do not think it would be necessary, even if we were able to do so, to add anything to the very able argument in that opinion (which for convenience of the court we have copied in full in the appendix to this brief), but will content ourselves with calling the court's attention to a few of the many authorities in support of our view.

In Freeman on Judgments, section 485, page 852, the rule is thus stated:

"As between National and State Courts, neither will undertake to grant relief from a judgment of the other, one having equitable grounds for relief from a judgment rendered in courts of either must apply to the courts of the sovereignty in which the judgment was rendered."
Citing Riggs vs. Johnson & Co., 6 Wall, 166.
U. S. vs. Keokuk, 6 Wall. 514.
Engles vs. Miller, 2 Ruh. Eq. 320.

Strozen vs. Hawes, 30 Ga. 578.
U. S. Statute at large, 335.

In the action of Hollister vs. Abbott, 64 Am. Dec. 342 we find the following language:

> "It is a well-established principle that a judgment of a court of record having jurisdiction of the cause and of the parties, is binding and conclusive upon the parties and privies in every other court until it is regularly reversed by some court having jurisdiction for that purpose. Notwithstanding the proceedings may be erroneous, yet, as between parties the judgment must stand until regularly vacated or reversed. Where a court has jurisdiction it has a right to decide every question which arises in the cause, and whether its decision be correct or otherwise, its judgment until reversed is regarded as binding in every other court. In no collateral way can the parties question the correctness of a judgment which has been rendered between them in a court having jurisdiction of them and of the subject-matter. The only way for them to investigate such a judgment is by a rehearing of that case, either on writ of error or by some other legal or direct mode. For to the extent to which the judgment goes their rights have been considered and decided, and they have submitted to that decision either from the course of law after a final hearing by the court of last resort, or from a disinclination to pursue the matter further when other courses of proceeding for rehearing were open before them and might have been had if they so elected."

And upon the authority of the case the Memphis, etc., R. Co. vs. Grayson (Ala.) 7 S. Hep., 122, and several other

cases cited, the rule is thus stated in the Am. and Eng. Ency. of Law, volume 12, page 1490:

> "The judgment of a sister State may be plead in bar to an action between the same parties on the original claim, although the latter action was begun before the action in which the judgment was pending."

This question of the conclusiveness of a judgment of a court of competent jurisdiction was under review in the case of Dupuy vs. Johnson, 4 Bibb, 562, and the court in that case said:

> "That a judgment or decree pronounced by a court having competent jurisdiction of the case is binding until it is reversed by a court of appellate jurisdiction, and that it never can be overruled or its correctness questioned in an original suit is a doctrine founded upon principles too solid to be shaken, and too obvious to require discussion. The contrary doctrine would involve the monstrous absurdity of making litigation endless and rendering every decision fruitless and unavailing."

In Garner's Adm'r vs. Strode, 5 Littell, 314, the question was whether a chancellor, on a proper issue made for that purpose, could correct the decree of a former term wrongfully entered, either through fraud or mistake, and could relieve against their consequences, and the court, through Judge Mills considering that proposition, said:

> "Whether the evidence and facts proved in the cause would be sufficient to correct this decree and change it from a decree on the merits to a simple dismission, without hearing, on a proper application by petition or bill of

review, we need not now determine, because the question is not presented to us in that shape, but we lay it down as a general rule that if such correction does ever take place it must be by a direct proceeding in that cause in which its record is made right, and that the matter which may be then held sufficient to change or correct can not be held good as an avoidance in another case. If the relief could be thus granted both records would be complete, one presenting a decree against, and the other for, the complainant on the same merits, which is absurd. To avoid the effect of a decree in another cause where its merits are collaterally brought into question can not be permitted. The first record must be first changed, and then its collateral operation will not be injurious. However strong the equity of the appellant may be, the bar must operate while it exists unaltered and unreversed."

The case of Paul, etc. vs. Smith, etc., 82 Ky. 431, was an ejectment for land, and the defense rested upon the validity of the title derived through a decretal sale, and the court said:

"The success or defeat of the appellants in this action depends on whether the Henry Circuit Court had jurisdiction to render said judgment, because it may be regarded as a legal maxim that when a judgment is offered in evidence collaterally in another suit, its validity can not be questioned except for want of jurisdiction in the court that rendered it."

To the same effect is Freeman on Judgments, volume 1, page 444:

"Nor is the effect of a judgment as *res judicata* lessened when the fact that it is erroneous is established by

the decision of the highest appellate tribunal in the State, rendered in another action. The law of the case seems not only to govern the action in its subsequent stages, but to control other actions between the same parties relating to the same subject-matter or transaction. Thus where several installments of money were due on a contract, and the court decided that it was such a contract that an action could be sustained for one installment without impairing the right to subsequently sue for another installment due when the first action was brought, it was held that the parties were estopped in a third action from contending that the decision in the prior action was erroneous, and that a judgment for any one installment merged others due when the action was brought. So where the character and effect of a writing is settled by the judgment of a court of competent jurisdiction it can not be shown in another action between the same parties that it ought to be given a different effect." * * *

Page 521, Sec. 284a:

"Defenses and causes of action once presented and considered cannot be again asserted in another suit, without a violation of the principles of *res judicata*. But the obstinacy with which litigants press their claims upon the attention of courts is such that it is not uncommon for matters once fully determined to be again made, or at least attempted to be made, the subjects of judicial inquiry. Sometimes the circumstances attending a former decision are such as to render the application of the law *res judicata*, apparently a matter of great injustice. * * * Generally, however, such is not the

case; and the instances are comparatively few in which any cause of action or any matter of defense is allowed to prevail where it is inconsistent with the facts necessary to uphold any previous adjudication between the same parties." * * *

Also Sec. 248, volume 1, page 439:

"There is nothing unjust or inequitable in insisting upon an estoppel by a judgment upon the same point; on the contrary, the rule is a beneficial one, and it is a matter in which the public is said to have an interest as well as the parties that there should be an end of litigation."

Citing San Francisco, etc., 52 N. W. 39 Cal. 473.

The exact point contended for in this case by the plaintiff in error was decided in Parkhurst vs. Berdell, 110 New York Reports, 384. In that case a judgment of the trial court was rendered, fixing certain rights between the parties to it, from which judgment an appeal was taken. But, in the meantime, another action was brought between the same parties in part, upon the same subject-matter, and the former judgment was relied on as an estoppel to the extent it related to the matters in controversy in the last suit, and the last suit proceeded to judgment with that estopped plead as evidence, and a judgment was rendered upon it. In the meantime, the first suit was heard by the appellate court and reversed, and the second suit came on to be heard in the same Court, and the reversal of the judgment in the first suit was relied on to avoid the operation of the estoppel, and the court held:

"If the judgment roll was competent evidence when received, its reception was not rendered erroneous by a

subsequent reversal of the judgment. Notwithstanding its reversal, it continued in this action to have the same effect to which it was entitled when received in evidence. The only relief a party against whom a judgment which has been subsequently reversed has thus been received in evidence can have, is to move on that fact in the court of original jurisdiction for a new trial, and then the court can, in the exercise of its discretion, grant or refuse a new trial, as justice may require."

So in the case at bar, counsel for the city, instead of pressing for a trial after the reversal of the judgment of February, 1896, should have applied to this court for leave to file a bill of review in the Circuit Court of the United States to open up the decree, as indeed they afterwards did. In no other way could they bring the reversal to the attention of the State court, by way of avoidance of the bar presented by the decree, than by such bill of review. And, although the fact does not appear in the record of this particular case, it is part of the history of this litigation that in January, 1902, the city did apply to this court for leave to apply to the Circuit Court to file a bill of review, upon the ground of that reversal, which leave was granted by this court, but that court refused to allow the bill to be filed.

We respectfully ask a reversal.

D. W. LINDSEY,
FRANK CHINN,
Counsel for Plaintiff in Error.

APPENDIX.

"CHAPTER 28.

"AN ACT to repeal certain State bank charters.

"Whereas, By virtue of a recent decision of the Supreme Court of the United States, all banks of this State, both State and National, are now required to pay State and local taxes in Kentucky, except the Bank of Kentucky, the Farmers Bank of Kentucky and the Deposit Bank of Frankfort, which three last-named banks, by virtue of said decision, are now claiming exemption from all State and local taxes, except as provided in the Hewitt law, during their corporate existence; therefore,

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"Section 1. That an act, entitled 'An act to establish the Bank of Kentucky,' approved February sixteenth, eighteen hundred and thirty-four, and all amendments and extensions thereof, also an act, entitled 'An act to incorporate the Farmers Bank of Kentucky,' approved February sixteenth, eighteen hundred and fifty, and all amendments and extensions thereof, also an act, entitled 'An act to incorporate the Deposit Bank of Frankfort,' approved March third, eighteen hundred and sixty-three, and all amendments and extensions thereof, be, and the same are hereby, repealed: Provided, That if said banks or either of them, on or before May first, nineteen hundred, file in Secretary of State's office their or its written consent to pay taxes under State and local levies of nineteen hundred and subsequent years, as provided in the Constitution and revenue statutes of this

State, the bank or banks thus agreeing shall be excepted from the operation of this act.

"Sec. 2. All acts and parts of acts in conflict herewith are hereby repealed.

"Sec. 3. Whereas, it is important that all banks of this State should be placed upon the same footing as to taxation without delay, an emergency exists, and this act shall take effect and be in force from and after its passage."

DISSENTING OPINION.

"Court of Appeals of Kentucky, January 15, 1902.

"BOARD OF COUNCILMEN OF CITY OF "FRANKFORT, . . . *Appellant.*	
vs.	Appeal from Franklin Circuit Court.
"DEPOSIT BANK OF FRANKFORT, *Appellee.*	

"Dissenting opinion by Judge O'Rear.

"To my mind the controlling question in this case is: Does the judgment of the United States Circuit Court of June, 1898, in the action of the Deposit Bank of Frankfort vs. Samuel H. Stone et al, decide necessarily the matter involved in this suit? If it does, the parties to this suit having been parties to that, the judgment being unreversed, and yet in force, it is a bar to this suit by appellant.

"Here appellant seeks to recover of appellee bank certain taxes under the existing revenue law. Appellee in the former action in the United States court claimed and that court decided that it had such a contract with the State of Kentucky, by having accepted the provisions of what was known as the 'Hewitt law,' that it could not

without its consent be taxed otherwise than as provided by that law—which did not admit of the taxation now sought to be enforced. In the suit in the Federal court taxes for the years 1895, 1896, 1897 and 1898, 'and any subsequent years,' seems to have been put directly in issue. The court's judgment, though, goes beyond the mere adjudication of the right to collect the municipal tax for those years 'and subsequent years.' The court adjudged:

"'It is further adjudged, ordered and decreed that by reason of the several pleas of *res adjudicata*, relied on by the complainant in its bill and as shown by the exhibits therewith, the complainant has established a contract with the Commonwealth of Kentucky under the provisions of article 2 of the act of the General Assembly of the State of Kentucky, entitled 'An act to amend the revenue laws of the Commonwealth of Kentucky,' approved May 17, 1896, and the acceptance of the same by the complainant, the terms of which contract the Commonwealth can not alter or change without the consent of the complainant; that by the terms of this contract the complainant and its shares of stock can not, during its corporate existence, be assessed for taxation for State purposes in a different mode or at a greater rate of taxation than as prescribed in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present Constitution of the Commonwealth of Kentucky and the act of November 11, 1892, so far as they are intended to provide, or do provide for any assessment or taxation of the complainant's property, rights of property, or franchise, or shares of stock, except to the extent and in the manner provided by sections 1, 2 and 3 of article 2 of said act

approved May 17, 1886, and except to assess and tax for county and municipal purposes upon its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void."

"It is said in the majority opinion that as the decision of the Federal court was based upon a judgment then in force in the State court, but subsequently reversed, the United States Court probably would not have decided the case as it did if the State court judgment had not then been in force. I apprehend that the question presented here by the plea of *res adjudicata* is not what the court ought to have decided, nor as to whether its decision was supported by the facts or in law; but *did it decide the question now involved?* From the language quoted from its judgment, I think it did. That judgment distinctly and unequivocally declared the acceptance of the Hewitt law by appellee was an irrevocable contract.

"It enjoined the city from attempting to collect any tax upon appellee's shares of stock, except in the manner and to the extent provided in the Hewitt bill. If we were at liberty to disregard the fact that was adjudicated, and in this collateral attack look merely to the basis or reason for the decision, we would at once have to determine, upon any plea of *res adjudicata*, the merits of the original controversy. This, of course, could not be allowed. To do so would be to abandon at once the whole doctrine of *res adjudicata*—one of the most necessary branches of the law of estoppel.

"The temptation is often strong, in a case of peculiar merit, to abandon, or at least to lay aside, the doctrine. Sometimes its very harshness repels the instinctive sense of justice. Yet upon a careful reconsideration of the reasons underlying it, and especially of the interminable confusion and uncertainty that must result in the con-

flicts inevitable upon its abandonment, I believe a safer course lies in its uniform, strict observance.

"This court has from a very early date, and with entire consistency until this decision, subscribed to the efficacy of the doctrine as generally applied by common-law courts.

"In Garner's Adm'r vs. Strode, 5 Litt. 314, where the judgment collaterally attacked was rendered by the court in which the plea against the attack was made, it was said:

"'To avoid the effect of a decree in another cause, where its merits are collaterally brought into question, can not be permitted. The first record must be first changed, and then its collateral operation will not be injurious. However strong the equity of the appellant may be, the bar must operate while it exists, unaltered and unreversed.'

"In the earlier case of Dupuy vs. Johnson, 1 Bibb, 565 (1809) by Judge Boyle, this court held:

"'That a judgment or decree pronounced by a court having competent jurisdiction of the case is binding until it is reversed by a court of appellate jurisdiction, and that it can never be overhauled, or its correctness questioned in an original suit, is a doctrine founded upon principles too solid to be shaken, and too obvious to require discussion. The contrary doctrine would involve the monstrous absurdity of making litigation endless, and rendering every decision fruitless and unavailing.'

"As late as Paul vs. Smith, 82 Ky. 451, this view has been sustained. So far as I know it has never before been questioned by the court.

"For these reasons alone the judgment below should have been affirmed.

"Judges DuRelle and Burnam concur in this dissent."

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Supreme Court U. S.
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 33

THE DEPOSIT BANK OF FRANKFORT.....*Plaintiff in Error*

vs.

THE BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT.....*Defendant in Error.*

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF FOR DEFENDANT IN ERROR.

T. H. CROCKETT, City Attorney.
IRA & W. H. JULIAN,
For Def't in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 296.

THE DEPOSIT BANK OF FRANKFORT.....*Plaintiff in Error*

vs.

THE BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT.....*Defendant in Error.*

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

This action is a suit in equity, instituted in the Franklin Circuit Court in August, 1894, by the city of Frankfort against the Deposit Bank of Frankfort.

The suit is for satisfaction of said city's demand against said bank for city *ad valorem* taxes under levies of 1892, 1893 and 1894, and also for certain penalties and interest.

By a final order entered in said Franklin Circuit Court on September 27th, 1894, from which no appeal was ever prayed, the taxes for 1892, and also said penalties and interest (that is, interest on 1893 and 1894 taxes up to the institution of this suit) were disposed of, leaving now in controversy herein only the taxes for 1893 and 1894, with legal interest thereon from August 22nd, 1894, until paid. (Record, pages 4 to 7.)

Said bank answered, relying upon its claim of exemption under the Hewitt Law. The case was submitted on the pleadings; and, on February 1st, 1896, the said Franklin Circuit Court sustained said claim of exemption, holding the Hewitt Law to be an irrevocable contract between said bank and the State, and dismissed the city's petition.

To said judgment of the Franklin Circuit Court, the city of Frankfort (Board of Councilmen of the City of Frankfort) ex-

cepted, and an appeal from said judgment was duly prayed and prosecuted by said Board of Councilmen to the Court of Appeals of Kentucky. (Record, pages 11 and 12.)

The case having been tried on said appeal in the Court of Appeals, said judgment of the Franklin Circuit Court was, on June 19th, 1900, reversed by said Court of Appeals upon the ground that the Hewitt Law never constituted an irrevocable contract between the Deposit Bank of Frankfort and the State, and had been repealed by the Revenue Act of 1892, and that said Deposit Bank was not exempt from taxation on its franchise under the Revenue Act of 1892. (Record, page 14.)

Thereupon a petition for rehearing was filed by said bank in the Court of Appeals, which was, on December 18th, 1900, overruled by the Court of Appeals. The order overruling said petition for rehearing was supported by an opinion delivered by Judge Hobson. (Record, pages 20 and 21.)

The case having been returned to the Franklin Circuit Court for new trial in accordance with said judgment and opinion of the Court of Appeals, said judgment of the Franklin Circuit Court which had been rendered on February 1st, 1896, was set aside and a new trial ordered under and in accordance with said judgment and opinion of the Court of Appeals.

Thereupon said bank filed a supplemental (or amended) answer, relying upon a judgment of the United States Circuit Court for the District of Kentucky, rendered on June 25th, 1898, in the case of Deposit Bank of Frankfort against Stone, Auditor, et al., as an estoppel against the city of Frankfort herein. A reply to said supplemental answer and rejoinder to said reply were also filed, making the sole remaining issue between the parties hereto—that is, whether or not the city of Frankfort was estopped from collecting the taxes herein by the said Federal Court judgment (decree) of June 25th, 1898?

The case having been tried in the Franklin Circuit Court on the pleadings as thus amended, on February 2, 1901, said Circuit Court rendered a judgment dismissing the petition upon the ground that there had not been a valid return of "no property found"—ignoring or not passing upon the said question of estoppel. (Record, pages 33 and 34.)

The Board of Councilmen of the City of Frankfort excepted to said second (2nd) judgment of the Franklin Circuit Court, and duly prosecuted an appeal therefrom to the Court of Appeals.

The case having been tried, on said second appeal, the Court of Appeals, on November 19th, 1901, reversed said second judg-

ment of the Franklin Circuit Court, holding that the city of Frankfort was not estopped from collecting the taxes herein by the said Federal Court judgment of June 25th, 1898. (Record, pages 169, 170, 171 and 172.)

From this last judgment of the Kentucky Court of Appeals, this Writ of Error is prosecuted.

No writ of error was ever prosecuted or prayed from the first said judgment of the Kentucky Court of Appeals, delivered by Judge Hazelrigg on June 19th, 1900. (Record, page 14.)

Hence, the question of whether or not the Hewitt Law constitutes an irrevocable contract between the Deposit Bank of Frankfort and the State, and also every other question which was involved in the case on trial of the said first appeal to the Court of Appeals, are now *res judicata* herein between the parties to this Writ of Error.

Every question and matter, therefore, has now been eliminated from this case, by the said final judgment of the Kentucky Court of Appeals (of June 19th, 1900), except the said question of estoppel by reason of the said Federal Court judgment of June 25th, 1898.

BRIEF OF ARGUMENT.

The sole ground relied on for reversal is the proposition, that the United States Circuit Court for the District of Kentucky (in Deposit Bank of Frankfort against Stone, Auditor, et al., decided on June 25th, 1898) held that the Hewitt Law constituted an irrevocable contract between the Deposit Bank of Frankfort and the State of Kentucky.

If that proposition were true, the said bank's plea of estoppel would not be available herein, because of the first judgment by the Kentucky Court of Appeals herein rendered on June 19th, 1900, from which no writ of error was ever prosecuted or prayed. (Record, page 14.)

An estoppel against an estoppel sets the matter at large. (Bigelow on Estoppel, 5th Ed., page 360, and authorities there cited.)

Said proposition, however, is unsound. Said Federal Court, in said case of Bank vs. Stone, Auditor, et al., did not hold that the Hewitt Law constituted an irrevocable contract between the Deposit Bank of Frankfort and the State of Kentucky.

All that said Federal Court, in said case (through Judge Taft), held was:

That *the Franklin Circuit Court* had, on February 1st, 1896, so held (that is, that the Hewitt Law was an irrevocable contract); and that the State and its municipalities and taxing districts were estopped by said judgment of the Franklin Circuit Court from collecting from said bank any other taxes than such as were provided for by said Hewitt Law, so long as said Franklin Circuit Court judgment remained unreversed and in full force and effect.

Judge Taft did not thereby approve said Franklin Circuit Court judgment as valid. On the contrary, Judge Taft, on said same day, June 25th, 1898, in his opinion which embraced all the Kentucky tax cases, decided on that day, held that the Hewitt Law did not constitute an irrevocable contract between the State of Kentucky and any bank which had accepted the same. (See Record, pages 148 and 149.)

There is no inconsistency whatever between said Federal Court decree of June 25th, 1898, and said State Court (Court of Appeals) judgment of June 19th, 1900.

The said question of Hewitt Law contract decided by the Kentucky Court of Appeals on June 19th, 1900, is an entirely different question from the said question of estoppel decided by Judge Taft on June 25th, 1898.

The former is a Federal question. The latter is not a Federal question. (Phœnix Insurance Co. vs. Tennessee, 161 U. S., 184.)

The said question of estoppel by reason of said Franklin Circuit Court judgment, decided by Judge Taft adversely to the city of Frankfort, is not involved in this case. Said Franklin Circuit Court judgment is not pleaded nor relied on as an estoppel herein.

The foregoing is the view of this case entertained by the Kentucky Court of Appeals on trial of the second appeal to that court herein. (See opinion of Court of Appeals, by Chief Justice Paynter, on second appeal to that court herein. (Record, page 170.)

When this case reached the Court of Appeals on the second appeal herein, no question whatever remained or was involved in the case which was involved in the case of Deposit Bank vs. Stone, Auditor, et al., decided by Judge Taft in 1898.

Hence, the judgment and opinion of the Court of Appeals, rendered on November 19th, 1901, from which this writ of error is prosecuted, was unquestionably correct. The objections thereto now being urged by the plaintiff in error are as unfounded as was its original claim of irrevocable contract.

All that this court has ever required of the courts of last resort of the States, in giving effect to Federal Court judgments, is: That Federal Court judgments be given the same effect that is given State Court judgments, of the same character and rendered under similar circumstances, by the courts of the State in which they are rendered.

We understand that section 905, Revised Statutes U. S., as construed by this court in numerous cases, so requires

In the case of Mills vs. Duryee, 7 Cranch, 484, this court having under consideration the question above suggested, after discussing the constitutional provision and act of Congress on the subject, Justice Story delivering the opinion, said:

> "It remains only then to inquire in every case what is the effect of a judgment in the state where it is rendered, * * * and we can perceive no rational interpretation of the act of Congress, unless it declares a judgment conclusive when a court of the particular state where it is rendered would pronounce the same decision."

In the case of Hampton vs. McConnel, 3 Wheaton, 234, this court, Chief Justice Marshall delivering opinion of the court, said:

> "This is precisely the same case as that of Mills vs. Duryee. The court cannot distinguish the two cases. The doctrine there held was, that the judgment of a state court should have the same credit, validity and effect, in every other court in the United States, which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States."

To the same effect is McElmoyle vs. Cohen, 13 Peters, 326; Christmas vs. Russell, 5 Wallace, 290; Thompson vs. Whitman, 18 Wallace, 457; Phoenix Ins. Co. vs. Tennessee, 161 U. S., 184; Abraham vs. Casey, 179 U. S., 218.

We have, therefore, only to ascertain the effect as an estoppel given to such judgments, as that relied on by appellee herein, "by the courts, laws and usage" of Kentucky. Would the same be a good plea of estoppel in the courts of Kentucky if the same were a judgment of that state?

In the case of City of Newport, &c., vs. Commonwealth, 21 Ky. L. Rep., 47 (decided April 26, 1899), the Kentucky Court of Appeals said:

"The only question remaining for decision is upon the plea of *res judicata*. The plea in this case avers that the subject-matter of the former suit was identical with that involved in this action and that the facts were the same in both actions, except that the former action attempted to collect a tax for the year 1893, and the present action was attempting to collect a tax for the year 1894. * * * * *

"The authorities seem to hold that when a court of competent jurisdiction has, upon a proper issue, decided that a contract, out of which several distinct promises to pay money arose, has been adjudged invalid in a suit upon one of those promises, the judgment is an estoppel to a suit upon another promise founded on the same contract. But taxes do not arise out of contract. They are imposed in invitum. The tax-payer does not agree to pay but is forced to pay, and *the right to litigate the legality of a tax* UPON ALL GROUNDS *must of necessity exist regardless of former adjudications as to the validity of a different tax.* * * * * *

"The decision of the Circuit Court as to the taxes for 1893 is not binding upon this court as to the taxes for subsequent years.

"It follows, therefore, that the judgment must be affirmed.

"The whole court sitting."

It matters not, therefore, *upon what ground* the exemption is claimed in the former suit—whether that of contract, or that the property is used for governmental purposes, or that it is exempted by statute, or that the exemption claimed is a vested or constitutional right—whatever the ground of exemption relied on and litigated in the former suit as to one year's taxes, the adjudication (according to the foregoing decision), is not conclusive as to the same matters of fact or law in a subsequent litigation between the same parties as to any other year's taxes.

The above doctrine, announced by the Kentucky Court of Appeals in 1899, in the foregoing case, has been uniformly adhered to by that court ever since, and has been reasserted by the same court in numerous cases between the date of said decision and the present time.

The next Kentucky case involving the same question was that of the Louisville Bridge Co. vs. The City of Louisville, 22 Ky. L. Rep., 703 (decided Oct. 17, 1900)—in which the Court of Appeals said:

"In response to appellant's plea of *res judicata*, it may be said that this identical question was before the court in the case of the Henderson Bridge Co. vs. The City of Henderson, decided June 24, 1896, and in the very recent cases of Newport vs. Masonic Temple Co., 20 Ky. L. Rep., 266, and The City of Newport vs. Commonwealth, 21 Ky. Law Rep., 42. It was held that a judgment as to the validity of taxes for one year is not conclusive as to the validity of taxes on the same property for another year, and as the question is fully considered in these cases it is unnecessary to elaborate it again."

On the same subject, in the case of Negley, Sheriff, vs. City of Henderson, 59 S. W., 19 (decided Nov. 21, 1900), a Kentucky case, the Court of Appeals said:

"This brings us to consider the question of *res judicata*. It was, in City of Newport vs. Commonwealth, *supra*, distinctly and emphatically held that an adjudication as to the tax of one year did not create the estoppel of *res judicata* against the same tax for another year."

The next case to same effect, in Kentucky, was that of Bell County Coke and Improvement Co. vs. The City of Pineville, 23 Ky. L. Rep., 933 (decided October 4, 1901). The substance of the decision is stated in the syllabus as follows:

"A judgment enjoining the collection of a tax for one year does not prevent the collection of a tax for another year."

The opinion, after stating the case and coming to the plea of *res judicata*, said:

"The case of the City of Newport, &c., vs. Commonwealth, 21 Ky. L. Rep., 42, is decisive of the question raised by the plea of *res judicata*."

The case of the Board of Councilmen of the City of Frankfort vs. Deposit Bank of Frankfort, 23 Ky. Law Rep., 1285 (decided on Nov. 19th, 1901), involved the same question. Exemption was claimed by the bank on the ground of a former adjudication of contract in a litigation as to taxes for the years 1895, '6, '7

and '8. The court, holding the plea of estoppel to be unavailable, said:

> "It is not necessary for this court to hold, and it does not (the question not being before it), that the bank is responsible for the taxes for the years involved in the Federal Court proceeding. However, we do hold that the judgment of the Federal Court is not a bar to a recovery of the taxes for the *years 1893 and 1894*.
>
> "This court, in City of Newport vs. Commonwealth, 21 Ky. Law Rep., 42; Louisville Bridge Co. vs. City of Louisville, 22 Ky. Law Rep., 703, held that an adjudication as to one year's taxes is not a bar to a recovery in the litigation as to any other year's taxes."

The last-named case was followed, on Dec. 19th, 1901, by the case of the Lou. Bridge Co. vs. City of Louisville, 65 S. W. R., 814. The plea of estoppel by *res judicata* was interposed as a ground of exemption. But the Court of Appeals (Ky.) said: "The plea of *res judicata* relied on for reversal has been decided so frequently adversely to the contention here made in recent decisions of this court that it is unnecessary for us to consider this question: It having been expressly decided that a judgment by a court of competent jurisdiction in a suit for taxes for one year did not constitute a bar in a subsequent suit between the same parties under the same law for another year's taxes"—(the court here citing with approval the Kentucky cases on that subject above referred to in this brief.)

In the case of Douglas vs. Commonwealth, 15 Ky. L. Rep., 581, the Court of Appeals held the same character of judgment as that now relied on by appellee to be no estoppel *solely upon the ground that the former judgment was erroneous and had been overruled.*

The court, on that subject, said:

> "It is contended that the subject of appellee's right is *res judicata* in this court. It is sufficient to say that the state had no constitutional right to contract its police power away, consequently the appellee made his purchase of the franchise subject to the right of the State to repeal it; and the decisions of this court that the appellee's purchase of the franchise by the authority of the legislature created a contract that could not, under the Federal Constitution, be revoked, having been

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virtually overruled by the Supreme Court of the United States (the fact that the said decisions by this court have been overruled) destroys the contention of the *res judicata*."

The opinion last cited was affirmed by this court, in Douglas vs. Kentucky, 168 U. S., 488.

There can be no doubt, therefore, what effect as an estoppel the Kentucky Court of Appeals would give the judgment relied on herein by the appellee as an estoppel if the same were a judgment of any court of Kentucky.

Viewed in the light of the Kentucky decisions alone, the same is not an estoppel in this case.

Hence, under the now well established principle first announced in Mills vs. Duryee, 7 Cranch, and adhered to by this court ever since, the plea of estoppel by appellee is not available herein.

II

The judgment from which this writ of error is prosecuted not only gives to the judgment relied on as an estoppel herein the same effect which that court has uniformly given to the same character of judgments rendered by the courts of Kentucky, but also the same effect which this court has uniformly given to such judgments.

There are two classes of estoppel by *res judicata*—namely, 1st, "estoppel by former judgment," and 2nd, "estoppel by former verdict."

Said two classes are defined as follows:

> "We have now ascertained the nature of the pleas of former judgment and of former verdict, and the distinction between them: the former operating as a bar to subsequent *actions* founded on the same demand; the latter operating as a bar to the further litigation of the special *findings* of the jury irrespective of the nature of the cause of action." (Bigelow on Estoppel, 5th Ed., pages 80 to 103, and authorities there cited.)

The claim of estoppel now relied on herein belongs to the 2nd of said two classes—namely, "estoppel by former verdict." (Keokuk & Western Railroad vs. Missouri, 152 U. S., 314 and 315.)

This character of estoppel is subject to very many restrictions.

Unlike estoppels by former judgment (which apply to all matters both of law and fact, which were litigated and determined in the former suit, and also to all matters which might have been litigated and determined in the former suit) the estoppel by former verdict is restricted to issues of *fact* which were *actually litigated and determined* in the former suit and which arise in the second suit under substantially the same circumstances as in the first action. (Cromwell vs. Sac, 94 U. S., 315; New Orleans vs. Citizens Bank, 167 U. S., 371.)

There are numerous other restrictions to which this character of estospel is subject, but the purposes of this case require only mention of those above stated.

There is now no issue of fact or of law involved in this case which was involved or determined in the case of Deposit Bank of Frankfort vs. Stone, Auditor, et al., decided on June 25th, 1898.

The question of the Hewitt Law contract was involved in this case until the same was eliminated from the case by the judgment of the Court of Appeals on the first appeal herein. Besides, that question was not decided adversely to the city of Frankfort in the said decree of June 25th, 1898. On the contrary, Judge Taft, in his opinion rendered in support of his several decrees entered on said date, decided that question adversely to the claim of irrevocable contract, thus sustaining the city of Frankfort's contention as to that question.

The question of estoppel in said litigation of 1898 was only as to the effect that should be given said Franklin Circuit Court judgment while the same remained unreversed and in full force and effect.

There is no such question of estoppel in this case.

Besides, said Franklin Circuit Court judgment has been reversed and set aside under a judgment of the Court of Appeals from which no appeal or writ of error has ever been, or can now ever be, prosecuted.

The sole foundation of the said decree of June 25th, 1898, has ceased to exist by subsequent events, and the rights of the parties to said litigation of 1898 completely reversed. When said decree was entered by Judge Taft, the city of Frankfort was estopped by said Franklin Circuit Court judgment, and the Deposit Bank was thereby exempt from taxation under the Revenue Act of 1892. Since said decree the circumstances and rights of the parties hereto have been changed, and the right adjudged to said bank on June 25th, 1898, has ceased to exist, because the sole ground of exemption from taxation has been removed, leaving

the Deposit Bank of Frankfort, with respect to taxation, precisely as it would have been had said erroneous judgment of the Franklin Circuit Court never been rendered. Galpin vs. Page, 18 Wallace, 374; Freeman on Judgments, 4th Ed., Vol. 1, Sec. 329, and authorities there cited.

The brief of counsel on the other side, and also the dissenting opinion below herein, proceed upon the hypothesis that the decree relied on herein as an estoppel belongs to the class of "estoppels by former judgments," instead of the class of "estoppels by former verdict." Hence, their vagueness, confusion and erroneous conclusions.

The defendant in error most respectfully asks that the judgment below be affirmed.

T. H. CROCKETT, City Attorney.
IRA & W. H. JULIAN,
For Def't in Error.

APPENDIX.

In the case of C. & V. R. R. Co. vs. Fosdick, 106 U. S., there had been certain decrees based entirely upon a preceding decree, which latter, in the meantime, had been *reversed;* and the Supreme Court held: That the reversal of the decree on which the other decrees were based, *ipso facto,* vitiated the latter, the Supreme Court using the following language:

"The decrees involved in this appeal now under consideration are dependent upon the decree of foreclosure and sale, and the latter having been reversed, the decrees in question *are left without support, and fall of themselves by reason of that reversal, vitiated by the common error.*" To the same effect is Butler vs. Eaton, 141 U. S., 243. So the decree and order of June 25, 1898 (in controversy herein), after reversal of said Franklin Circuit Court judgment, *is left without support, and falls of itself by reason of the reversal of the judgment on which it was based.*

Besides, there is no REASON for the chancellor's giving any other or further effect to a decree or order of injunction *after the foundation thereof has been destroyed, and the purpose thereof has been fully accomplished,* whatever the general language of injunction (which is always used with especial reference to the state of case existing at the time of the decree) may be. (Pennsylvania vs. Wheeling and Belmont Bridge Co., 18 Howard, 421; also City of Newport vs. Newport Light Co., 14 Ky. L. Rep., 485.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

No. 33.

DEPOSIT BANK OF FRANKFORT.....Plaintiff in Error.

vs.

THE BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT.....Defendant in Error.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

If the decree of June 25th, 1898, relied on as an estoppel herein, were a judgment of a State Court of Kentucky, the case of Phœnix Insurance Co. vs. Tennessee, 161 U. S., 174, would be conclusive against the said claim of estoppel. But said decree having been rendered by the United States Circuit Court for the District of Kentucky, it remains to be determined whether or not the Kentucky Court of Appeals has given full faith and credit and the proper effect to the said decree, as required by the Constitution and laws of the United States.

What effect, as an estoppel, should the courts of Kentucky give to said decree of June 25th, 1898? The answer is, that the courts of Kentucky should give to said decree the same effect as an estoppel as if it were a State court judgment of Kentucky.

In Metcalf vs. Watertown, 153 U. S., 676, this Court said:

"In Dupasseur vs. Rocheran, 21 Wall., 130, 135, Mr.

Justice Bradley, speaking for the Court, said: 'The only effect that can be justly claimed for a judgment in the Circuit Court of the United States is such as would belong to judgments of the State courts rendered under similar circumstances; and it is apparent, therefore, that no higher sanctity or effect can be claimed for the judgment of the Circuit Court of the United States rendered in such a case under such circumstances than is due to the judgments of the State courts in a like case and under similar circumstances.' The same views were expressed by this Court through Mr. Justice Mathews in Embrey vs. Palmer, 107 U. S., 7, 9, 10; Crescent Live Stock Co. vs. Butcher's Union, 120 U. S., 141, 146, 147. It can not be doubted that, in respect to their effect under section 905, the judgments and decrees of the Circuit Courts of the United States are entitled to the same sanctity and effect in the courts of each State, when those courts are held within the State, as their own judgments, nothing more, but nothing less."

Though the said decree of 1898 was rendered by a Federal Court, it was rendered in Kentucky, and in a controversy between citizens of Kentucky, and should be regarded as a domestic judgment of the State of Kentucky, at least for the purposes of this case. (Metcalf vs. Watertown, 153 U. S., 680.)

It remains, then, only to determine what effect should be given the said decree of June 25th, 1898, if the same were a State Court judgment of Kentucky.

The substance of the appellant's contention is that, because his honor Judge Taft held, on rendition of said decree, that the Hewitt Law never did constitute an irrevocable contract between the state and any bank which accepted the same, the City of Frankfort is now estopped from denying the existence of such irrevocable contract. So far as the adjudication, by his honor Judge Taft, that the city of Frankfort was estopped by the unreversed judgment of the Franklin Circuit Court (of February 1st, 1896) is concerned, that adjudication is wholly foreign to this case. The plaintiff in error is not now relying upon any plea or claim of estopped by reason of said Franklin Circuit Court judgment.

The decree of 1898 was in a litigation as to taxes for 1895 to 1898, inclusive. This case involves only the taxes for 1893 and 1894, and interest thereon.

The said former litigation, therefore, having been concerning a different "*demand*" from that involved in this action, the parties to this action could only be estopped by the said former decree upon the principal of "*estopped by former verdict*" announced by this court in the case of Cromwell vs. Sac, 94 U. S., 315—that is, by a determination, in said former litigation, of some issue of fact which is presented for decision in this action; and, since neither of the two issues determined in said former litigation (namely, that as to contract, and that as to estopped by the Franklin Circuit Court judgment) is now presented for decision in this action, the claim of estoppel herein is untenable and unfounded. With deference to counsel on the other side, we are unable to see any semblance of ground for the contention, that the city of Frankfort is estopped herein by the said decree of June 25th, 1898.

There is no proposition, either of law or of fact, upon which the city of Frankfort now relies, or that is necessary to its recovery herein, which is inconsistent with any finding of the said decree.

The only proposition on which the city of Frankfort now relies, or ever relied herein, and the only proposition that is or was ever necessary to its recovery herein is, that the Hewitt law never constituted an irrevocable contract between the State and a y bank which accepted the same. The said decree does not controvert that proposition. On the contrary, when viewed in the light of Judge Taft's opinion in support thereof, it sustains that proposition. Besides, that proposition is now *res judicata* herein by the first decision of the Kentucky Court of Appeals herein, from which no writ of error was ever or can now ever be prosecuted. Then suppose it were conceded that said decree was an adjudication of irrevocable contract, as contended by this bank, what is the result? This Court would then be confronted with two inconsistent final adjudications—one by the Kentucky Court of Appeals and the other by the United States Circuit Court for the District of Kentucky. Each of those adjudications is as potent as an estoppel as the other—the two neutralize each other—and the said question of contract is set at large. (Bigelow on Estoppel, 5th Ed., page 360, and authorities there cited.)

But, in addition to the said *res judicata* in the Kentucky Court of Appeals, and in addition to the fact that the said decree of 1898 was not an adjudication that the Hewitt law was an irrevocable contract, that decree was in a litigation as to taxes

for the years 1895 to 1898, inclusive, while this case involves only taxes for 1893 and 1894, and interest thereon. Said decree is, therefore, only conclusive in Kentucky as to the taxes for 1895 to 1898, inclusive.

It is now well settled in Kentucky, by more than a dozen decisions of the Kentucky Court of Appeals, that an adjudication in a litigation as to one year's taxes is not conclusive in a subsequent litigation as to any other year's taxes (the two suits being between the same parties and under the same law). (For Kentucky authorities on that subject, see original Brief for Defendant in Error, filed herein, pages 5, 6, 7, 8 and 9) See also, on same subject, recent opinion by his honor Judge Cochran, of the United States Circuit Court for the Eastern District of Kentucky, in First National Bank of Covington vs. The City of Covington, now in this Court on appeal, and docketed as case No. 414, said opinion being on pages 96 to 102 of the printed Transcript of Record.

In said opinion, his honor Judge Cochran declares the rule of law in Kentucky, on that subject, to be as above stated in this Brief. The said rule of law, as to the effect of former judgments in tax cases, is the same in Kentucky as in the state of Tennessee. Hence, the recent opinion of this Court, by his honor Chief Justice Fuller, in the case of Union and Planters Bank vs. Memphis, Supreme Court Reporter, Vol. 23, No. 12, page 604 (decided last spring) is conclusive against the claim of estoppel herein—independently of the general principles of estoppel by *res judicata*.

The Court of Appeals of Kentucky, in its last opinion herein, has given to the said decree of 1898 the same effect as an estoppel which that Court would have given said decree had it been a State Court judgment of Kentucky. There is nothing in the Constitution or laws of the United States, or in the decisions of this Court, which requires that a judgment of a United States Circuit Court of Kentucky should have any greater or other effect as an estoppel than if it were a State Court judgment of Kentucky. We insist, however, as urged in our original Brief herein, that the said decree of 1898 having been based entirely upon an unreversed judgment of the Franklin Circuit Court while the same remained in full force and effect, and said Franklin Circuit Court judgment having since been reversed by the Court of Appeals, the said decree of 1898 should not now be enforced, because the foundation thereof has been destroyed, and the reason for the rendition thereof no longer exists. (See original Brief for Defendant in Error, page 12.)

In applying the law of estoppel the Chancellor will not exclude from his consideration the real *equity* of the case.

The estoppel insisted upon by the Plaintiff in Error would only result in defeating a just demand which should have been paid immediately after this Court held, in 1899, that this bank was not protected by contract from equal taxation under the revenue laws of Kentucky.

The only semblance of merit there ever was in this bank's defense herein was its original claim of contract rights. It having been determined by this Court, and by all the Courts of Kentucky, both State and Federal, that this bank never possessed any immunity from taxation by reason of irrevocable contract rights, the defense herein is entirely without real merit.

The Defendant in Error is entitled to recover herein its taxes under the *ad valorem* levies of 1893 and 1894, with legal interest thereon from August 22nd, 1894, until paid. We are not informed as to what damages the Defendant in Error will be entitled to in the event of affirmance of the judgment below. We ask that, in event of affirmance, this Court will award such damages to the Defendant in Error as, under the rules of Court, it may be entitled to.

We submit that the judgment of the Kentucky Court of Appeals herein should be affirmed with damages.

T. H. CROCKETT, City Attorney,
IRA & W. H. JULIAN,
For Defendant in Error.

AUTHORITIES.

1st. In the adjudication of 1898, relied on as an estoppel herein, his honor Judge Taft did not find nor hold that the Hewitt law constituted an irrevocable contract between the State and any bank which accepted the same. (Printed Transcript of Record herein, pages 148 to 152.)

2nd. The decree of June 25th, 1898, relied on as an estoppel herein, having been based entirely upon an unreversed judgment of the Franklin Circuit Court while it remained in full force and effect, and said Franklin Circuit Court judgment having since been reversed by the Court of Appeals, the said decree should not now operate as an estoppel between the parties thereto whose rights have been changed by the said reversal. (Galpin vs. Page, 18 Wallace, 374; Freeman on Judgments, 4th Ed., Vol. 1, Sec. 329, and authorities there cited.)

3d. After reversal of the Franklin Circuit Court judgment by the Court of Appeals, the said decree of 1898 should not be enforced, because the sole foundation of said decree was, by said reversal, destroyed, and the reason for the rendition thereof no longer exists. (C. & V. R. R. Co. vs. Fosdick, 106 U. S., 84; Butler vs. Eaton, 141 U. S., 243; Pennsylvania vs. Wheeling & Belmont Bridge Co., 18 Howard, 421; City of Newport vs. Newport Light Co., 14 Ky. L. Rep., 485.)

4th. The said decree of 1898 having been rendered in a litigation as to taxes of 1895 to 1898, inclusive, while this case only involves the taxes of 1893 and 1894 and interest thereon, said decree could only operate as an estoppel herein to the extent of some finding of fact in the former adjudication, which fact is in issue in this case. There being in this case no issue that was ever decided adversely to the city of Frankfort in any former case, there is no estoppel in this case. (Keokuk & Western Railroad vs. Missouri, 152 U. S., 314 and 315; Bigelow on Estoppel, 5th Ed., pages 80 to 103; Cromwell vs. Sac, 94 U. S., 315; New Orleans vs. Citizens Bank, 167 U. S., 371.)

5th. The contract issue was decided adversely to the Plaintiff in

Error, both by his honor Judge Taft, in said former litigation of 1898, and by the Kentucky Court of Appeals in its first decision of this case. If counsel on the other side will not concede that Judge Taft so decided, he will concede that the Court of Appeals so decided. If Judge Taft decided as counsel on the other side contend, then we have two contrary and inconsistent adjudications of said contract issue, which adjudications neutralize each other —"an estoppel against an estoppel sets the matter at large." (Bigelow on Estoppel, 5th Ed., page 360, and authorities there cited.)

6th. A Federal Court judgment of Kentucky should be given the same effect as an estoppel as if it were a State Court judgment of Kentucky. (Metcalf vs. Watertown, 153 U. S., 676, and authorities there cited.)

7th. In Kentucky an adjudication as to one year's taxes is not conclusive in a subsequent litigation as to any other year's taxes (the two cases being between the same parties and under the same law). (For Kentucky authorities on this subject, see original Brief for Defendant in Error, filed herein, pages 5, 6, 7, 8 and 9.) See also, on same subject, recent opinion by Judge Cochran, of the United States Circuit Court for the Eastern District of Kentucky, in case No. 414, on docket of this term of this Court, Record, pages 96 to 102.

8th. The rule of law in Kentucky as to the effect of former judgments in tax cases is the same as in the State of Tennessee. Hence the recent opinion of this Court by his honor Chief Justice Fuller, in the case of Union and Planters Bank vs. Memphis, Supreme Court Reporter, Vol. 23, No. 12, page 604 (decided last spring), is conclusive against the claim of estoppel herein.

Supreme Court of the United States.

No. 33.—October Term, 1903.

The Deposit Bank of Frankfort, Plaintiff in Error, vs. The Board of Councilmen of The City of Frankfort. } In error to the Court of Appeals of the State of Kentucky.

[December 14, 1903.]

This action was brought by the board of councilmen of the city of Frankfort in the Franklin Circuit Court for the recovery of certain ad valorem taxes under levies for the years 1892, 1893 and 1894. The tax for the year 1892 has been eliminated from the controversy, and the matters now disputed include the taxes for the years 1893 and 1894 and interest. The bank in the first instance relied upon the provisions of a certain law of the State of Kentucky, known as the Hewitt law, as exempting it from the taxes sought to be enforced. This law was passed in 1886, (Session Laws of Kentucky, 1885–6, pp. 140, 144–7, 201,) and provided:

"Section 1. That shares of stock in State or national banks, and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed 75 cents on each share thereof, equal to $100, or on each $100 of stock therein owned by individuals, corporations or societies, and said banks, institutions and corporations shall, in addition, pay upon each $100 of so much of their surplus, undivided surplus and undivided accumulations as exceeds an amount equal to ten per cent of their capital stock, which shall be in full of all tax, State, county and municipal.

"Sec. 4. That each of said banks, institutions or corporations, by its corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levy of said tax, and agree to pay the same as herein provided, and to waive and release all rights under the act of Congress, or under the charters of the State banks, to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the governor of this Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of such bank.

"Sec. 5. The said bank may take the proceeding authorized by section 4 of this act at any time until the meeting of the next general assembly: provided, they pay the tax provided in section 1 from the passage of this act.

"SEC. 6. This act shall be subject to the provisions of section 8, chapter 68, of the General Statutes.

"SEC. 7. If any bank, State or national, shall fail or refuse to pay the tax imposed by this act, or shall fail or refuse to make the consent and agreement as prescribed in section 4, the shares of stock of such bank, institution or corporation, and its surplus, undivided accumulations and undivided profits, shall be assessed as directed by section 2 of this act, and the taxes—State, county and municipal—shall be imposed, levied and collected upon the assessed shares, surplus, undivided profits, undivided accumulations, as is imposed upon the assessed taxable property in the hands of individuals: Provided, that nothing herein contained shall be construed as exempting from taxation for county or municipal purposes any real estate or building owned and used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed."

The Deposit Bank of Frankfort accepted the terms of the Hewitt law and made payment of the taxes as therein provided.

The Circuit Court of Franklin County, by judgment upon the pleadings in this case, sustained the bank's claim of exemption, holding the Hewitt law to be an irrevocable contract between the bank and the State. Upon appeal, this judgment was reversed by the Kentucky Court of Appeals, that court holding that the Hewitt act did not constitute an irrevocable contract, and had been repealed by the later act of 1892, under which act the bank was not exempt from payment of the taxes in controversy.

After the case was remanded to the Circuit Court for a new trial the bank filed a supplementary answer, setting up as an estoppel a decree of the United States Circuit Court for the District of Kentucky rendered in 1898, in a case to which the bank and the complainant were parties. The decree in that case was rendered upon a bill filed by the bank, in which it set up, among other things, a certain judgment of the Franklin Circuit Court rendered in 1896, in which it was adjudged that the Hewitt law constituted an irrevocable contract exempting the bank from taxation. At the time of the rendition of the decree in the United States court the judgment of the State Circuit Court relied on was in full force although subsequently reversed by the Kentucky Court of Appeals.

In the Federal court the following decree was rendered:

"The court being sufficiently advised, files its opinion herein.

"It is therefore adjudged, ordered and decreed as follows:

"First. That the demurrer of the defendants Board of Councilmen of the City of Frankfort and Franklin County and of the defendants Samuel H. Stone, G. W. Long and Charles Finley be, and the said demurrers are, hereby overruled; to which the said defendants each except.

"Second. The plea of defendants Board of Councilmen of the City of Frankfort and Franklin County to the bill of complaint is overruled; to which the said defendants except.

"Third. Thereupon came the complainant, by Frank Chinn, its counsel, and files its replication to the answer of the defendants, Board of Coun-

cilmen of the City of Frankfort and Franklin County. The defendants, County of Franklin and City of Frankfort, offered to file an amended answer; to which complainant objected, and the motion to file is overruled; to which said defendants except, and said amended answer is made a part of the record by the order of the court.

"And by consent this cause came on to be heard for final decree. The complainant read upon hearing its bill of complaint and its amended bill of complaint herein, together with all the exhibits filed with said bills, to wit:

"Exhibit 'A,' being the record of the proceedings in the case of Deposit Bank of Frankfort against Franklin County and John W. Gaines, sheriff.

"Exhibit 'B,' being the records in the proceedings in the case of Deposit Bank of Frankfort against Franklin County and R. D. Armstrong, sheriff.

"Exhibit 'C,' being judgment of Franklin Circuit Court, entered February 1, 1896, in the suit of Deposit Bank of Frankfort against Franklin County.

"Exhibit 'D,' being record of the proceedings in the case of Board of Councilmen of City of Frankfort against Deposit Bank of Franklin.

"The defendant, The County of Franklin, read on the hearing its answer, and the defendant Board of Councilmen of the City of Frankfort read on the hearing the record of the proceedings in the case of Board of Councilmen of City of Frankfort against L. C. Norman, auditor, &c., and also read its answer.

"And it is now adjudged, ordered and decreed that the defendants, Samuel H. Stone, Charles Finley and George W. Long be, and they are hereby, perpetually enjoined and restrained from proceeding to value the franchise of the complainant under the act of November 11, 1892, for the years 1895, 1896, 1897, 1898, or for any other subsequent years until the expiration of the charter of the complainant, and are enjoined and restrained from certifying such value to the county clerk of Franklin County or to any officer of the board of councilmen of the city of Frankfort or the county of Franklin and the defendants, County of Franklin and Board of Councilmen of the City of Frankfort, are enjoined and restrained from endeavoring to collect any tax upon any such valuations; and the complainant, by making payments in accordance with the Hewitt law, is discharged in full from all taxes to be exacted from it under any form or by any authority.

"It is further adjudged, ordered and decreed that by reason of the several pleas of *res judicata*, relied on by the complainant in its bill, and as shown by the exhibits therewith, the complainant has established a contract with the Commonwealth of Kentucky, under the provisions of article 2 of the act of the general assembly of the State of Kentucky, entitled 'An act to amend the revenue laws of the Commonwealth of Kentucky,' approved May 17, 1886, and the acceptance of the same by the complainant, the terms of which contract the Commonwealth cannot alter or change without the consent of the complainant; that by the terms of this contract the complainant and its shares of stock cannot, during its corporate existence, be assessed for taxation for State purposes in a different mode or at a greater rate of taxation than as prescribed in said act, and can be assessed for taxation and taxed for county and muni-

cipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present constitution of the Commonwealth of Kentucky and the act of November 11, 1892, in so far as they are intended to provide or do provide for any assessment or taxation of the complainant's property, rights of property, or franchise, or shares of stock, except to the extent and in the manner provided by sections 1, 2 and 3 of article 2 of the said act approved May 17, 1886, and except to assess and tax for county and municipal purposes upon its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void.

"And it is further adjudged that the complainant recover of the defendant its costs in this action expended.

"And came defendants and prayed an appeal in open court, and tendered their assignment of errors; whereupon the court allowed the appeal, and orders the assignment of errors to be filed and fixes the appeal bond at one thousand dollars."

This decree of 1898 was afterwards affirmed in this court. (174 U. S. 800.) The Franklin Circuit Court in the case now before us dismissed the petition upon the ground that there had been no proper return of no property found, and did not pass upon the question as to whether the decree of the United States court was effectual as an estoppel between the parties. Upon appeal to the Court of Appeals of Kentucky, it was held by a majority of the court, three judges dissenting, that the decree relied upon was not an estoppel. By writ of error that judgment is brought here for review.

Mr. Justice DAY delivered the opinion of the Court.

The so-called Hewitt law, set forth in the foregoing statement, has given rise to much litigation in the courts of Kentucky, as well as in those of the United States. At one time it was held by the Court of Appeals of Kentucky that its provisions, when complied with by the bank seeking to avail itself of its privileges, constituted a valid and binding contract. (*Commonwealth, to use of Franklin Co.*, v. *Farmers' Bank of Kentucky et al.*, 97 Ky. 590.) In a later case the Court of Appeals of Kentucky held the law not to constitute an inviolable contract. (*Deposit Bank of Owensboro* v. *Daviess Co.*, 120 Ky. 174.) When the law was before this court, the same conclusion was reached. (*Bank of Owensboro* v. *City of Owensboro*, 173 S. U. 635.)

It may be now regarded as the settled law that this enactment did not constitute a contract between the State and the banks as to taxation, but is subject to modification and repeal by subsequent laws of the State undertaking to tax bank property.

In this case we have to deal with the effect of a decree of the Circuit Court of the United States which is unreversed and affirmed in this court, and in which, between the parties to the present action, it was held that the Hewitt law was a valid enactment and constituted a contract between

the parties within the protection of the contract clause of the Constitution of the United States. A proper consideration of the question requires that it shall be distinctly understood just what this decree is. The bill which was the basis of the action of the court was broad in its terms, and sought not only to enjoin the collection of the taxes for the years 1895–6–7–8, which were involved, but to have it finally adjudicated that the Hewitt law constituted a contract between the parties which shielded the bank from taxation after complying with the provisions of that law. The decree not only provided for a perpetual injunction enjoining the taxation for the years specifically mentioned, but further:

"It is further adjudged, ordered and decreed that by reason of the several pleas of *res judicata*, relied on by the complainant in its bill and as shown by the exhibits therewith, the complainant has established a contract with the Commonwealth of Kentucky under the provisions of article 2 of the act of the general assembly of the State of Kentucky, entitled 'An act to amend the revenue laws of the Commonwealth of Kentucky,' approved May 17, 1886, and the acceptance of the same by the complainant, the terms of which contract the Commonwealth cannot alter or change without the consent of the complainant; that by the terms of this contract the complainant and its shares of stock cannot, during its corporate existence, be assessed for taxation for State purposes in a different mode or at a greater rate of taxation than as prescribed in said act, and can be assessed for taxation and taxed for county and municipal purposes only upon its real estate used by it in conducting its business; that the provisions of the present constitution of the Commonwealth of Kentucky and the act of November 11, 1892, in so far as they are intended to provide or do provide for any assessment or taxation of the complainant's property, rights of property, or franchise, or shares of stock, except to the extent and in the manner provided by sections 1, 2 and 3 of article 2 of the said act approved May 17, 1886, and except to assess and tax for county and municipal purposes upon its real estate used in conducting its business, are in violation of and repugnant to the Federal Constitution and void."

The constitution of the Commonwealth of Kentucky, adopted after the passage of the Hewitt law, made provision for the enactment of laws for the taxation of the property of banks. Passed under the authority of these constitutional provisions, the act of November 11, 1892, referred to in the decree of the Federal Circuit Court of 1898, is the legislation subsequent to the Hewitt law under which it is sought to assess and collect taxes involved in the present suit. If this decree is to be given force and effect, as having adjudicated the Hewitt law to be a binding contract covering the right to tax the bank, there can be no question that this subsequent legislation is violative of the constitutional inhibition against the States from enacting laws impairing the obligation of contracts. This legislation is in absolute conflict with the Hewitt law. (*City Bank of Owensboro* v. *City of Owensboro*, 173 U. S., *supra*.) The decree declares in terms, as

direct and specific as it is possible to make them, that the act now sought to be enforced in the assessment and collection of taxes is in violation of the Federal Constitution, and therefore void.

The judgment of the State court upon which the decree of the Federal court is predicated was equally broad in its terms, and covered not only the particular years of assessment then in question but the broader right of the parties to be protected under the Federal Constitution against State enactments in violation of the contract provision of that instrument.

It is urged that the State judgment upon which the Federal decree of 1898 is based was afterwards reversed by the highest court of Kentucky, and, therefore, the foundation of the decree has been removed and the decree itself must fall. But is this argument sound? When a plea of *res judicata* is interposed based upon a former judgment between the parties, the question is not what were the reasons upon which the judgment proceeded, but what was the judgment itself, was it within the jurisdiction of the court, between the same parties, and is it still in force and effect? The doctrine of estoppel by judgment is founded upon the proposition that all controversies and contentions involved are set at rest by a judgment or decree lawfully rendered which in its terms embodied a settlement of the rights of the parties. It would undermine the foundation of the principle upon which it is based if the court might inquire into and revise the reasons which led the court to make the judgment. In such case, nothing would be set at rest by the decree; but the matter supposed to be finally adjudicated, and concerning which the parties had had their day in court, could be reopened and examined, and if the reasons stated were in the judgment of the court before which the estoppel is pleaded insufficient, a new judgment could be rendered because of these divergent views and the whole matter would be at large. In other words, nothing would be settled, and the judgment, unreversed, instead of having the effect of forever settling the rights of the parties, would be but an idle ceremony. We are unable to find reason or authority supporting the proposition that because a judgment may have been given for wrong reasons or b[illegible]een subsequently reversed, that it is any the less effective as an estoppel between the parties while in force. In the *Crescent Live Stock Co.* v. *Butchers' Union Slaughter House Co.* (120 U. S. 141,) the question of what effect should be given to a decision of a court of the United States as proof of probable cause in a suit for a prosecution which was alleged to be malicious was before the court. It appeared that the judgment relied upon had been subsequently reversed, and it was held that this made no difference unless it was shown that the judgment was obtained by means of fraud. Mr. Justice Matthews, delivering the opinion of the court, said:

"Its integrity, its validity and its effect are complete in all respects between all parties in every suit and in every forum where it is legitimately produced as the foundation of an action, or of a defense, either by

plea or in proof, as it would be in any other circumstances. While it remains in force it determines the rights of the parties between themselves, and may be carried into execution in due course of law to its full extent, furnishing a complete protection to all who act in compliance with its mandate, and even after reversal it still remains, as in the case of every other judgment or decree in like circumstances, sufficient evidence in favor of the plaintiff who instituted the suit or action in which it is rendered, when sued for a malicious prosecution, that he had probable cause for the proceeding."

The precise question was before the Court of Appeals of New York in *Parkhurst* v. *Berdell*, (*110 N. Y. 386,*) in which case a judgment was relied upon as an estoppel in a suit between the same parties. The first suit settled certain matters in controversy in the second suit, and was given force and effect as an estoppel, but was afterwards reversed by the appellate court. The second suit, in which it was relied upon, came before the Court of Appeals, and it was claimed that the reversal of the judgment in the first suit would avoid its force as an estoppel between the parties. The court said:

"If the judgment roll was competent evidence when received, its reception was not rendered erroneous by the subsequent reversal of the judgment. Notwithstanding its reversal, it continued in this action to have the same effect to which it was entitled when received in evidence. The only relief a party against whom a judgment which has been subsequently reversed has thus been received in evidence can have, is to move on that fact in the court of original jurisdiction for a new trial, and then the court can, in the exercise of its discretion, grant or refuse a new trial, as justice may require."

It is to be remembered that we are not dealing with the right of the parties to get relief from the original judgment by bill of review or other process in the Federal court in which it was rendered. There the court may reconsider and set aside or modify its judgment upon seasonable application. In every other forum the reasons for passing the decree are wholly immaterial and the subsequent reversal of the judgment upon which it is predicated can have no other effect than to authorize the party aggrieved to move in some proper proceeding, in the court of its rendition, to modify it or set it aside. It cannot be attacked collaterally, and in every other court must be given full force and effect, irrespective of the reasons upon which it is based. (Cooley on Const. Limitations, 7th ed., 83 *et seq.*, and cases cited.)

Again, it is urged that the taxes herein involved are those for different years than were under consideration and covered by the decree of the Federal court relied upon. The vice of this argument consists in assuming that the taxes for specific years were alone involved and covered by the decree of the court. The controversy was as to the force and effect of the Hewitt law as a contract; not for one year but for all years; not for one

assessment, but for all assessments of taxes upon certain property of the bank. The contest was over the contract, and the consequent want of power to collect any and all taxes the assessment of which did violence to the contract rights of the bank. The court had jurisdiction of the parties and of the subject matter of the suit, and it was adjudicated that there was a contract which was entitled to protection against impairment by State legislation within the right guaranteed by the Federal Constitution. This adjudication necessarily included not only the taxes for specific years, but foreclosed the right to collect any taxes concerning which the contract afforded immunity to the bank. That a bank charter and laws having the effect of bank charters may constitute valid and binding contracts conclusive between the parties, is now so well settled by the adjudications of this court as not to be open to discussion. (*New Orleans* v. *City Bank*, 167 U. S. 371.) In that case it was held that a judgment of the District Court of New Orleans, holding the charter of a bank to constitute a binding and conclusive contract between the parties, although involving the taxes of other years than those in suit, was *res judicata* and conclusive between the parties. In the course of the opinion, Mr. Justice White said:

"The proposition that because a suit for a tax of one year is a different demand from the suit for a tax for another, therefore *res judicata* cannot apply, whilst admitting in form the principle of the thing adjudged, in reality substantially denies and destroys it. The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even though there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies. This is the elemental rule, stated in the text books and enforced by many decisions of this court. . . .

"It follows, then, that the mere fact that the demand in this case is for a tax for one year, and the demands in the adjudged cases were for taxes for other years, does not prevent the operation of the thing adjudged, if in the prior cases the question of exemption was necessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed."

This case is cited with approval in *Southern Pacific R. R. Co.* v. *United States*, (168 U. S. 1,) in which the decisions of this court upon the subject of *res judicata* are reviewed by Mr. Justice Harlan and the general doctrine thus stated:

"A right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right question or fact, once so determined, must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

The thing established by the Federal decree relied upon here was the binding and conclusive character of the contract embodied in the Hewitt law and its acceptance. That it was such a contract was then adjudicated, and, irrespective of the reasons given for the decision, must remain concluded until the judgment constituting such adjudication is modified or reversed.

But it is said that the question here is simply what force and effect the State court should give to the decree of the Federal court relied upon. It is argued that there should be given to a Federal judgment the same force and effect that the State court gives to a judgment of a court of the State, in which the Federal judgment is relied upon, neither more nor less. Cases are cited from the Kentucky Court of Appeals which may be said to establish that an adjudication concerning taxes for one year cannot be pleaded as an estoppel in suits in that State involving the taxes of other years. It is true that for some purposes and within certain limits it is only required that the judgments of the courts of the United States shall be given the same force and effect as are given the judgments of the courts of the State wherein they are rendered; but it is equally true that whether a Federal judgment has been given due force and effect in the State court is a Federal question reviewable by this court, which will determine for itself whether such judgment has been given due weight or otherwise. (*Crescent City Live Stock Co.* v. *Butchers' Union Slaughter Co., supra; Pittsburg R. R. Co.* v. *Loan & Trust Co.*, 172 U. S. 493.) In the latter case, Mr. Justice Harlan, after reviewing the case upon this subject, thus states his conclusion.

"According to these decisions and in view of the statute giving this court authority to examine the final judgment of the highest court of a State, denying a right specially set up or claimed under an authority exercised under the United States, it is clear that we have jurisdiction to inquire whether due effect was accorded to the foreclosure proceedings in the Circuit Courts of the United States under which the plaintiff in error claims title to the lands and property in question."

When is the State court obliged to give to Federal judgments only the force and effect it gives to State court judgments within its own jurisdiction? Such cases are distinctly pointed out in the opinion of Mr. Justice Bradley in *Dupasseur* v. *Rochereau*, (21 Wall. 135,) where the learned justice says:

"The only effect that can be justly claimed for the judgment in the Circuit Court of the United States is such as would belong to judgments of the State courts rendered under similar circumstances. Dupasseur and Co. were citizens of France and brought the suit in the Circuit Court of the United States as such citizens; and consequently that court, deriving its jurisdiction solely from the citizenship of the parties, was in the exercise of jurisdiction to administer the laws of the State, and its proceedings were had in accordance with the forms and course of proceeding in the

State courts. It is apparent, therefore, that no higher sanctity or effect can be claimed for the judgment of the Circuit Court of the United States rendered in such case under such circumstances than is due to the judgments of the State courts in a like case and under similar circumstances."

The cases which, by clear inference, cannot come within this class are to be noticed.

When it was said that no higher sanctity or effect can be given to a judgment of the Circuit Court of the United States than to State judgments, the learned judge is careful to say "in like case under similar circumstances." What are these cases? Manifestly those just stated, wherein the court derives its jurisdiction from the citizenship of the parties and in the exercise of the jurisdiction to administer the laws of the State where the proceedings are had. Where language has been used in other cases to the effect that judgments of the Federal courts are to be given the effect given to domestic judgments, they will be found to be cases where questions of general law are under consideration, and coming within the class suggested by Justice Bradley in the opinion quoted. Such is the case of *Crescent Live Stock Co.* v. *Butchers' Union Slaughter House Co.*, *supra*. It was there held that a judgment of the United States court, relied upon as a ground of probable cause in a suit for malicious prosecution, was to be given the same force and effect as judgments in the State courts. But Mr. Justice Matthews, delivering the opinion, was careful to add:

"Whatever deference may be due to the decisions of the State court of final resort in every case in which it has spoken, and whatever may be the respect to which its decisions upon questions of purely local law established as rules of property may be entitled, they are not authority binding upon the courts of the United States, sitting even in the same State, where the questions involved and decided relate to rights arising under the Constitutions and laws of the United States."

In *Embry* v. *Palmer*, (107 U. S. 3,) it was held that the Supreme Court of the District of Columbia is a court of the United States and its judgments conclusive in the courts of a State except for such cause as would be sufficient to set it aside in the courts of the District.

Mr. Justice Matthews, who delivered the opinion, again stated the doctrine that the judgments of the courts of the United States are upon the same footing so far as concerns the obligation created by them with judgments of the States. Other cases are found in the reports stating the general proposition.

In *Union & Planters' Bank* v. *Memphis*, (189 U. S. 71,) the question was as to the effect to be given to a State judgment as *res judicata*. It was held that the Federal courts were not required to give such domestic judgments any greater force and effect than was awarded them by the courts of the State where rendered.

But it is equally well settled that a right claimed under the Federal Constitution, finally adjudicated in the Federal courts, can never be taken away or impaired by State decisions. The same reasoning which permits to the States the right of final adjudication upon purely State questions requires no less respect for the final decisions of the Federal courts of questions of national authority and jurisdiction.

This principle is now so thoroughly settled as to need but to be stated. It has been reiterated in a line of decisions following the great judgment of Chief Justice Marshall in *Cohens* v. *Virginia*, (6 Wheaton, 264,) in which the principle was firmly established. As early as *Ohio Life Insurance & Trust Co.* v. *Debolt*, (16 How. 416–432,) Chief Justice Taney said:

"Indeed, the duty imposed upon this court to enforce contracts honestly and legally made, would be vain and nugatory, if we were bound to follow those changes in judicial decisions which the lapse of time and the change in judicial officers will often produce. The writ of error to a State court would be no protection to a contact, if we were bound to follow the judgment which a State court had given, and which the writ of error brings up for review here." (*McCullough* v. *Virginia*, 172 U. S. 102; *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436; *Douglas* v. *Kentucky*, 168 U. S. 488, 501, and cases cited).

In the last named case, Mr. Justice Harlan, delivering the opinion, deals with the question as follows:

"The defendant insists that his right having been acquired when those decisions of the highest court of Kentucky were in full force, should be protected according to the law of the State as if was adjudged to be when those rights attached. But is this court required to accept the principles announced by the State court as to the extent to which the contract clause of the Federal Constitution restricts the powers of the State legislatures? Clearly not. The defendant invokes the jurisdiction of this court upon the ground that the rights denied to him by the final judgment of the highest court of Kentucky, and which the State seeks to prevent him from exercising, were acquired under an agreement that constituted a contract within the meaning of the Federal Constitution. This contention is disputed by the State. So that the issue presented makes it necessary to enquire whether that which the defendant asserts to be a contract was a contract of the class to which the Constitution of the United States refers. This court must determine—indeed, it cannot consistently with its duty refuse to determine—upon its own responsibility, in such a case as it arises, whether that which a party seeks to have protected under the contract clause of the Constitution of the United States is a contract the obligation of which is protected by that instrument against hostile State legislation." (*Mobile & Ohio Ry.* v. *Tennessee*, 153 U. S. 486; *Knox Co.* v. *Ninth National Bank*, 147 U. S. 91; *McGaley* v. *Virginia*, 135 U. S. 662.)

These cases thoroughly established the proposition that in no other way can the obligation of the Federal courts under the Constitution be discharged than by rigidly adhering to the right and duty to maintain the

ultimate right of the Federal courts to protect the citizens of the United States, and of every State, in the enjoyment of rights and privileges guaranteed by the Federal Constitution.

We suppose there is no question that if the State court had refused to give effect to the Hewitt law as a binding contract, and that question were presented here upon writ of error, and this court reached a different conclusion, holding the Hewitt law to constitute a contract, the judgment of the State court would be reversed for the denial of the right claimed under the Federal Constitution. In the present case we are asked to go further and sustain the judgment of the State court in the face of a judgment of a Federal Circuit Court, affirmed in this court, and duly invoked for the protection of the party in whose favor it was rendered in an action between the same parties. In *Des Moines Navigation & Railroad Co.* v. *Iowa Homestead Co.*, (123 U. S. 552,) a suit was brought in an Iowa court by the Homestead Company to recover taxes for the years 1864 to 1871. The right to recover the same taxes had been litigated between the same parties and decided adversely to the Homestead Company in the case of *Homestead Co.* v. *Valley R. R.*, (17 Wall. 153.) The railroad company set up the decree in its favor as a bar to the action. The Homestead Company replied: "That the decree or judgment referred to is null and void, for the reason that the courts of the United States had no jurisdiction of said suit, and no legal power or authority to render said decree or judgment." The Supreme Court of Iowa held that the question of prior adjudication had not been properly raised before it, and decided the case without considering the point. This court held that the point was duly made and that the Federal court had jurisdiction in the suit relied upon, and decided in 17 Wallace; and held further that the Supreme Court of Iowa, in refusing to give effect to the prior judgment as an estoppel, had denied to the Navigation Company the Federal right set up. In delivering the opinion, Mr. Chief Justice Waite said:"

"As the Circuit Court entertained the suit, and this court, on appeal, impliedly recognized its right to do so, and proceeded to dispose of the case finally upon its merits, certainly our decree cannot, in the light of prior adjudications on the same general question, be deemed a nullity. It was at the time of the trial in the present case in the court below a valid and subsisting prior adjudication of the matters in controversy, binding on these parties, and a bar to this action. In refusing to so decide the court failed to give full faith and credit to the decree of this court under which the Navigation and Railroad Company claimed an immunity from liability to the Homestead Company on account of the taxes sued for, and this was error."

This reasoning is applicable here. The decree of the Federal court of 1898 gave judgment that the bank had a contract absolving it from all taxes, including those sued for. When the State court refused to give

hat judgment effect it denied a right secured by the Federal court judgment upon matters wherein its decision was final until reversed in this court, or modified or set aside in the court of its rendition.

In our judgment the adjudication of the Federal court relied upon here, although based upon the judgment of a State court given as a reason therefor, is equally effectual, as it would have been had the Federal court reached the conclusion, as upon the original question, that the Hewitt law constituted a binding contract between the parties. Any other conclusion strikes down the very foundation of the doctrine of *res judicata*, and permits the State court to deprive a party of the benefit of its most important principle, and is a virtual abandonment of the final power of the Federal courts to protect all who come before them relying upon rights guaranteed by the Federal Constitution and established by the judgments of the Federal courts.

It is true that the final determination of the courts that the Hewitt law did not constitute a contract, and the reversal of the State court judgment which was the basis of the decree in the Federal court, renders this case one where a court might wish to avoid the application of rules which may seem technical. But the protection of the right of parties as well as the interest of the public to end litigation by a final judgment, and to preserve inviolate the safeguards of the Federal Constitution, should never be overlooked in view of the hardship of particular cases. And we repeat that we are not dealing with any right of relief which the State may have in the Federal court wherein the original decree was rendered.

Judgment reversed and cause remanded.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 33.—October Term, 1903.

The Deposit Bank of Frankfort, Plaintiff in Error } In error to the Court
vs. } of Appeals of the
The Board of Councilmen of the City of Frankfort. } State of Kentucky.

[December 14, 1903.]

Mr. Chief Justice Fuller, with whom concurred Mr. Justice Brewer, Mr. Justice Brown and Mr. Justice Peckham, dissenting:

This was a petition in equity filed by defendant in error in the Circuit Court of Franklin County, Kentucky, seeking the recovery of certain taxes for the years 1893 and 1894, penalties and interest. To revise the judgment of the Court of Appeals of Kentucky rendered November 19, 1901, this writ of error was sued out, and the question is whether that court erred in declining to direct the Franklin Circuit Court to sustain a plea of former adjudication by the decree of the Circuit Court of the United States rendered June 25, 1898, in enforcement of a decree of the Franklin Circuit Court rendered in the same case February 1, 1896, and which was reversed by the State Court of Appeals, June 19, 1900.

The plea or supplemental answer was filed in the Franklin Circuit Court February 1, 1901, on the remanding of the case to that court. The case went off on other points, but, being again carried to the Court of Appeals, it was held that as the taxes involved in this case were those for 1893 and 1894, and those involved in the case in the United States court were the taxes for 1895, 1896, 1897 and 1898, and as it was the settled law of Kentucky that an adjudication in respect of the taxes of one year was not a bar to recovery in litigation in respect of the taxes of another year, the decree of the United States Circuit Court, based on the reversed decree in this case, could not be treated as a bar to the collection of the taxes for 1893 and 1894, on the view that the thing adjudged was the existence of a contract created by the Hewitt law, which exempted the banks from liability for such taxes during the lifetime of their charters; and that to decide otherwise would be to hold that the prior decree in this case, though reversed, was nevertheless made binding by the decree of another jurisdiction rested upon it, as having determined the invalidity of taxes of other years, notwithstanding the law of the State to the contrary.

And the Court of Appeals was fortified in its conclusion by the fact that the Supreme Court of the United States, the Court of Appeals, and

the Circuit Court of the United States in opinions delivered at the time of the rendition of the decree in question, had all held that the Hewitt law did not constitute an irrevocable contract.

The case before us stands in the same situation as if the Franklin Circuit Court had overruled the plea of former adjudication and rendered decree for complainant, and the Court of Appeals had thereupon affirmed that decree; and it seems to me that the Franklin Circuit Court could not have done otherwise in view of the law of the State in respect of litigation as to taxes of different years.

Moreover there is a distinction between estoppel by decree and estoppel by the findings on which the decree rests, in that the one operates as a bar to subsequent suits on the same cause of action, and the other to further litigation of the particular issuable facts found.

And I submit that the thing adjudged by the Circuit Court of the United States was not that the Hewitt law constituted a contract between the State and the banks, which exempted the banks from this taxation, but was that the Board of Councilmen was estopped to deny the alleged contract because of the decree of the Franklin Circuit Court. This is explicitly stated in the decree as the ground of the decree, and the decree could have rested on no other ground, as the suit was in effect a suit to enforce the State court decree, and, conceding the potency attributed to the doctrine of *res judicata*, the Circuit Court of the United States could not have exercised an original judgment on the question of contract or not, but was compelled to accept the existence of the contract as "established" by the decree of the Franklin Circuit Court.

I think it follows that when a decree rests on the establishment by a prior decree of a certain conclusion of law, such ground of the prior decree cannot be treated as merely reasons for the later decree, which as mere reasons may be ignored; and that this must necessarily be so when the court rendering the later decree is shut up to the single question of estoppel. This being so, I differ entirely from the view that the controversy in the Federal court was at large as to the force and effect of the Hewitt law as a contract exempting the banks from taxation not only for the specified years but for all other years. The decree cannot be treated as giving to the Franklin Circuit decree a wider scope than the law of the State allowed, and the law of the State was that the doctrine of *res judicata* is not applicable to taxes for years other than those under consideration in the particular case. See *Union &c. Bank* v. *Memphis*, 189 U. S. 71, 75, and cases cited.

It is true that the decree of the United States Circuit Court enjoined the taxes involved in that suit, and also the taxes for subsequent years, but this was upon the express ground that the decree of the State Circuit Court had established a contract of exemption during the corporate existence

of the bank; and whatever the terms of the latter decree, the State law permitted a renewal of the controversy in respect of taxes not directly involved. To apply the Federal decree to any other than the taxes enumerated is to hold that matters of public law can be placed by estoppel beyond the power of reconsideration, a doctrine not heretofore favored by this court. *Boyd* v. *Alabama*, 94 U. S. 645; *Brownsville* v. *Loague*, 129 U. S. 493; *O'Brien* v. *Wheelock*, 184 U. S. 750.

It is the duty of the State courts as well as of the Federal courts to see to it that no act of a State legislature impairing the obligation of a contract is sustained, and it is the duty of the Federal courts as well as of the State courts to see to it that no act of a State legislature is avoided on the pretext of impairment of the obligations of a contract, when in fact there is no contract to impair. Here this court and the highest court of the State of Kentucky agree that there is no contract, and yet a valid law of Kentucky is overthrown on the pretence of a contract which confessedly has no existence. The reason given is that the Federal court once held that there was a contract when in truth that court held that there was no contract, but that defendant in error was estopped to assert that fact by reason of a judgment of the State court, which has since been duly vacated. The decision is, therefore, not based upon any provision of the Federal Constitution, but upon a rule of general law as to the conclusiveness of a judgment. But that rule of general law is, like any other, subject to modification or change by the State, and it is as true of Kentucky as of Tennessee that the rule of *res judicata* as applied to taxes does not embrace other taxes than those immediately in litigation. Repeated decisions of this court are that a Federal judgment is entitled to the same consideration as a State judgment, "no more and no less," and we held in *Union Bank* v. *Memphis* that what effect a judgment of a State court shall have as *res judicata* is a question of State law.

In my judgment the State courts in rendering decree for the taxes of 1893 and 1894 did not refuse to give the Federal decree such effect as it was entitled to.

Of course, I express no opinion as to the taxes for 1895–6–7 and 8, the immediate subject of the bill in the United States court. The situation of that case is peculiar. The decree of that court was affirmed in this court on appeal by an equal division, May 15, 1899. 174 U. S. 800. Leave was subsequently granted by this court to appellants to apply to the Circuit Court for leave to file such bill as counsel might be advised. The present defendant in error (appellant there) accordingly applied to that court for leave to file a bill of review, which was denied. 120 Fed. Rep. 165. The case was then carried to the Circuit Court of Appeals for the Sixth Circuit, and that court affirmed the order of the Circuit Court. 124 Fed. Rep. 18. The court stated that the judgment of the Franklin Circuit Court rested on

a former decision of the Court of Appeals of Kentucky holding the revenue act of 1892 void as an impairment of the State's contract with the banks, and that, after the decree of the United States Circuit Court, the Court of Appeals of Kentucky overruled its former decision; and the United States Court of Appeals then held that the consequent reversal of the Franklin Circuit judgment furnished no adequate ground for the revision of the decree of the United States Circuit Court.

The prior decision of the Court of Appeals of Kentucky was rendered June 1, 1895, and is reported 97 Ky. 590. That decision was overruled by a decision rendered March 24, 1897, and reported 19 Ky. Law Rep. 248. The decree of the Circuit Court of the United States was rendered June 25, 1898. There were many cases under consideration in the State Court of Appeals, and it happened that the decree of the Franklin Circuit Court was not in fact reversed until June 19, 1900. But as the ground on which that decree rested had been swept away in 1897, the Circuit Court of the United States might well have applied the rule laid down by Lord Redesdale, that where a party comes into a court of equity to have the benefit of a former decree, the court is at liberty to inquire whether the circumstances justified the relief. Mitf. Pl. 96; 138 U. S. 561. This was not done, and the Federal decree has not, as yet, been set aside.

But Lord Redesdale's rule is applicable in this case, and that is in itself sufficient to require the affirmance of the judgment of the Court of Appeals of Kentucky.

My Brothers BREWER, BROWN and PECKHAM concur in this dissent.

True copy.

Test:

Clerk Supreme Court, U. S.